

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

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(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: WHITE PACKING COMPANY, INC. I&G Docket No. 83. Decided December 2, 1986.

Suspension—Removal of “USDA Product Control” device—Consent.

Respondent consented to the issuance of this decision in which they were suspended from receiving federal meat grading and acceptance services for a period of one (1) year.

Kevin B. Thiemann, for complainant

John J. Sullivan, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621 *et seq.*) (Act), and regulations issued thereunder (7 CFR Part 54) to withdraw and deny the benefits of federal meat grading and acceptance services from White Packing Company, Inc., respondent. This proceeding was commenced by a complaint filed on September 8, 1986, by the Agricultural Marketing Service, United States Department of Agriculture, which is responsible for the administration of federal meat grading and acceptance services. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purpose of this Stipulation and the provisions of this Consent Decision only, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact contained herein; and waives;

a) Any further proceedings;

b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

c) All the rights to seek judicial review and otherwise challenge or contest the validity of this Decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. White Packing Company, Inc., respondent, is, and at all times material herein was, a corporation which operates a meat processing establishment, and whose address is P.O. Box 95, King George, Virginia 22485.

2. Respondent is now, and at all times material herein was, receiving federal meat grading and acceptance services provided by the Agricultural Marketing Services (AMS) of the United States Department of Agriculture at its establishment at King George, Virginia.

3. On or about March 5, 1986, respondent offered for acceptance to an AMS grader sliced bacon which was identified as Lot 63 and which was prepared for the United States Department of Defense under contract number DLA 13H-86-C-E 422.

4. Lot 63 was rejected by the AMS grader for being off-conditioned and thus could not be reworked and reoffered for AMS acceptance service.

5. The USDA alleges that on or about March 5, 1986, the respondent reboxed portions of Lot 63 into boxes marked "Lot 64" with the contract number DLA 13H-86-C-E 422.

6. The USDA alleges that on or about March 11, 1986, the respondent removed a "USDA Product Control" device from a box identified as "Lot 64" without the express permission of an authorized representative of the U.S. Department of Agriculture.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision and Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. Federal meat grading and acceptance services provided under the Act and regulations issued thereunder are withdrawn from and denied to the respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate or other device, for a period of one (1) year beginning on December 1, 1986, and ending on November 30, 1987. Four (4) consecutive months of actual suspension will begin on December 1, 1986, and end on March 31, 1987. The remaining eight (8) months of the one (1) year withdrawal period will be held in abeyance and will not become effective:

a. For so long as, within one (1) year from the effective date of this Consent Decision and Order, respondent, or any of its officers, employees, or agents do(es) not violate any section of the Act (7

U.S.C. § 1621 *et seq.*) or the regulations issued thereunder (7 CFR Part 54); and

b. For so long as, within one (1) year from the effective date of this Consent Decision and Order, respondent:

1. Does not knowingly hire, in any capacity, any individual who has been convicted of any felony; and

2. To the extent permitted by Virginia law, dismisses from its employment any such individual, hired after the effective date of this Consent Decision and Order, when that individual's conviction becomes known.

2. The violation of any provision in paragraph 1 of this Order will result in the immediate withdrawal of federal meat grading and acceptance services under the Act. The Secretary of Agriculture shall have the right to summarily withdraw such services upon finding of a violation by appropriate national headquarters staff. Any summary withdrawal of grading and acceptance services shall be subject to respondent's right to request an expedited hearing on the alleged violation. Moreover, nothing in this Consent Decision shall preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

3. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

4. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: JOE L. HENSON, D.M.V. AQ Docket No. 264. Decided November 4, 1986.

Civil Penalty—Consent.

The Judicial Officer affirmed the default order issued by Judge Weber assessing a civil penalty of \$500 against respondent for moving 1 cow that was not individually identified on an owner's or shipper's statement or other document, as required by the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's answer fails to request a hearing and does not deny the allegations of the complaint. Accordingly, a default decision was properly issued.

Jaru Ruley, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, 122), for a violation of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.18). An initial Decision and Order was issued on August 18, 1986, by Administrative Law Judge William J. Weber (ALJ) assessing a civil penalty of \$500.

On June 16, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on October 22, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR § 78.18 *et seq.*),

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1063 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on May 8, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about May 24, 1985, the respondent caused the interstate movement of one cow from Chatom, Alabama, to Mize, Mississippi, in violation of sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)) in that the cow was not individually identified on an owner's or shipper's statement or other document. In his answer, the respondent admitted the material allegations contained in the complaint, thereby waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Joe L. Henson, D.V.M., is an individual whose address is P.O. Box 326, Chatom, Alabama 36518.

2. On or about May 24, 1985, the respondent caused the interstate movement of one cow, twenty-four months of age or older, from Chatom, Alabama, to Mize, Mississippi, in violation of sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)) in that the cow was not individually identified on an owner's or shipper's statement or other document, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objec-

tions are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a \$500 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not the respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies

of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer fails to request a hearing and does not deny the allegations of the complaint. Specifically, respondent's answer states:

The cow that you were referring to belonged to Charles Busby Rt 1, Tippie, Al. 36588. There was one truck load of heifers or about 80 head permitted from his farm to Mise, Mississippi on or about the 24th day of May, 1985. They were all Calfhood Vaccinated against bangs and properly identified as such to the best of my ability. The Mississippi State Veterinarian's Office in Jackson was called and these cattle were issued a permit number. At this time I asked if these cattle were to be individually identified and was instructed to only list the number of vaccinated heifers to be shipped. A certificate of Veterinary Inspection was then issued to Mr. Busby.

I cannot explain how a 2 year old cow got into this load of heifers, but I can explain what I did to determine the age of these cattle prior to shipment.

* * * * *

There was a lot of time and effort spent trying to determine the correct age and proper procedure for shipping these heifers and if there was a mistake made in shipping one too old it was surely not done intentionally.

I regret this happened and if I can be of any further assistance on this please let me know.

Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or

where complainant did not object,² respondent has shown no basis for setting aside the default decision here.³

² *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

³ *See In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."⁴ If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalty assessed here is modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Brady*, 45 Agric. Dec. ___, slip op. at 67 (Jan. 31, 1986):

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ___, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.⁴ (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

⁴ Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal

⁴ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); accord *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285)

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent \$73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Joe L. Henson, D.V.M., is hereby assessed a civil penalty of \$500, which shall be paid within 30 days after service of this order. This civil penalty shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Jaru Ruley, U.S. Department of Agriculture, Officer of the General Counsel, Room 2422, South Building, Washington, D.C. 20250-1400.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. AQ Docket No. 259. Decided November 6, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision and was assessed a civil penalty of \$100.

*Robert L. Broussard, for complainant.
Respondent, pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR §§ 71.1 *et seq.*, 78.1 *et seq.*). The complainant and the respondent, Ronald B. Pitchford, have agreed that this proceeding should be terminated with respect to Ronald B. Pitchford by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mr. Ronald B. Pitchford, respondent, is an individual whose address is P.O. Box 683, Hartford, Arkansas 72938.

2. On or about March 29, 1985, the respondent moved interstate approximately twenty-four (24) cattle from Greenwood, Arkansas to Rock Island, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars (\$100.00) in four (4) monthly installments of twenty-five dollars (\$25.00) each which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be sent to USDA, APHIS, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403. The first installment is due within thirty (30) days from the effective date of this order and the remaining three installments are due within sixty (60), ninety (90) and one hundred and twenty (120) days of the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: EDWARD GEORGE DIAMOS and RANDY L. BAKER. AQ Docket No. 287. Decided November 17, 1986.

Dismissal.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

MOTION TO DISMISS WITH RESPECT TO RANDY L. BAKER

For good cause shown, complainant's motion to dismiss the complaint against respondent Randy L. Baker, is granted.

In re: LEONARD McDANIEL, JACK STEWART, and LOUISE STEWART, d/b/a L&W CATTLE COMPANY. AQ Docket No. 257. Decided December 8, 1986.

Civil Penalty

The Judicial Officer affirmed Judge Baker's order assessing civil penalties totaling \$4,000 (\$1,000 per violation) for violations of the Act and regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, a default decision and order was properly issued. Although respondent's appeal was filed 2 days late, it is the practice of this Department to accept late appeals filed before the initial decision becomes final. Even if respondent had filed a timely answer, it would not have changed the result.

in this case. Respondent's understanding that the case had been settled (when he incurred financial hardship by having to take his cattle to the sale barn for branding) is not supported by the record and would not signify a "settlement" to an adult person of reasonable understanding. Assessing a civil penalty because respondent failed to have the required certificate and assessing a separate civil penalty because respondent failed to have the required permit for entry, in the same transaction, does not violate the Double Jeopardy Clause. The Clause applies to criminal proceedings. It protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. But a single transaction may contain distinct offenses without violating the Clause. Two offenses are not the same for double jeopardy purposes if one requires proof of a fact that the other does not. Respondent's unsupported claim that a \$4,000 civil penalty will impose a financial hardship on him is not a circumstance that mitigates the sanction in view of the importance of the Brucellosis Eradication Program.

William Jensen, for complainant.

Carl LeForce, Idabel, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER WITH RESPECT TO LEONARD McDANIEL

This is an administrative proceeding for the assessment of civil penalties under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122) for violations of the Act and the regulations promulgated thereunder (9 CFR § 78.1 *et seq.*), governing the interstate movement of cattle without required documents. An initial Default Decision and Order was filed September 12, 1986, by Administrative Law Judge Dorothea A. Baker (ALJ) assessing civil penalties totaling \$4,000 (\$1,000 per violation).

On October 24, 1986, respondent ¹ appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² The case was referred to the Judicial Officer for decision on November 25, 1986.

Based upon a careful consideration of the record, the initial Default Decision and Order is adopted as the final Decision and Order in this case (with minor trivial changes), except that the effective

¹ By order of July 7, 1986, the ALJ dismissed the complaint as to respondents Jack Stewart and Louise Stewart, d/b/a L&W Cattle Co., without prejudice. The complainant had so moved on July 1, 1986, based upon newly discovered evidence.

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1063 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

date of the order is changed in view of respondent's appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that Leonard McDaniel violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and section 78.9 of the regulations promulgated thereunder (9 CFR § 78.9). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon Leonard McDaniel.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) Leonard McDaniel was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegations in the complaint would constitute an admission of such allegations pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Mr. McDaniel was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Leonard McDaniel filed no answer or any other document during the twenty-day period provided. His failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). His failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Mr. McDaniel is deemed to have admitted the material allegations of the facts in the complaint as they applied to him, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Leonard McDaniel, respondent herein, is an individual whose address is Route 3, Box 496, Idabel, Oklahoma 74745.

2. On or about January 8, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Antlers, Oklahoma, approximately seven (7) cattle, in violation of section 78.9(d) of the regulations (9 CFR § 78.9(d)), because the cattle were not accompanied by a certificate, as required.

3. On or about January 8, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Antlers, Oklahoma, approximately seven (7) cattle, in violation of section 78.9(d) of the regulations (9 CFR § 78.9(d)), because the cattle were not accompanied by a "Permit for Entry," as required.

4. On or about April 1, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Idabel, Oklahoma, approximately 10 cattle, in violation of section 78.9(d) (9 CFR § 78.9(d)) of the regulations, because the animals were not accompanied by a certificate, as required.

5. On or about April 1, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Idabel, Oklahoma, approximately 10 cattle, in violation of section 78.9(d) (9 CFR § 78.9(d)) of the regulations, because the animals were not accompanied by a "Permit for Entry," as required.

CONCLUSION

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint as they applied to him and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following Order is therefore issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and

shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with

the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer "shall constitute an admission of the allegation[s] in this complaint and a waiver of hearing" (Complaint at 3).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did

not object,³ respondent has shown no basis for setting aside the default decision here.⁴

³ *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁴ See *In re Mayes*, 45 Agric. Dec. ____ (Nov. 24, 1986) (default order proper where answer not filed); *In re Pieszko*, 45 Agric. Dec. ____ (Nov. 12, 1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. ____ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airline*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984) (default order proper where timely answer was not filed; respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁶ If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

In fact, Complainant's Response to Respondent's Appeal argues that the appeal was filed late, on October 24, 1986, and thus should not be considered. The appeal *was due* to be filed 2 days earlier, October 22, 1986, but, in accordance with the practice of this Department, it is accepted late since it was filed before 35 days after service of the initial decision, when it would have become final. *In re Machado*, 42 Agric. Dec. 1454, 1455 n.3 (1983) (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished); *In re Shatkin*, 34 Agric. Dec. 296, 315 (1975); and *see In re Burton*, 40 Agric. Dec. 1534 (order vacating notice of effective date and permitting late appeal), *final decision*, 40 Agric. Dec. 1738 (1981) (decision as to LeRoy Franks), *rev'd on other grounds*, 638 F.2d 280 (8th Cir. 1982).

Respondent's appeal sets forth three contentions:

- (A) That it was respondent's understanding that the case was settled because respondent was required to take his cattle to the sale barn for "B" branding, resulting in financial hardship;

Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁶ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

- (B) That the complaint, as reflected in the ALJ's findings numbered 2 and 3, and 4 and 5, respectively, asserts separate violations from facts and circumstances arising on the same days—January 8, 1985, for Findings 2 and 3; and April 1, 1985, for Findings 4 and 5—which constitutes “double jeopardy”; and
- (C) That respondent is financially “hard pressed” to pay a \$4,000 civil penalty.

As has been painstakingly detailed in the preceding pages, the Department's rules of practice deem it an admission of all material allegations if no answer is filed to the complaint. Therefore, these three contentions would have no effect on the decision below. However, even if these contentions are considered in their best possible circumstances, apart from the respondent's failure to file an answer, they would not change the outcome.

A. Respondent's Understanding that Case Had Been Settled Not Supported by the Record or Any Other Reasonable Interpretation of the Proceeding.

The record as a whole shows no basis for a misunderstanding as to the Department's intent in this case. There is no deception, or attempt to mislead respondent, by the Department anywhere in the record. To the contrary, this has been a straightforward proceeding against an experienced cattleman.

In complainant's reply, complainant's attorney correctly points out that respondent does not allege that there is factual error in the ALJ's Default Decision and Order. Moreover, complainant argues that there is no connection of relevancy shown between the surrounding facts in the case and respondent's understanding of settlement. I agree with complainant's attorney.

Such a claim of misunderstanding possibly could have been raised in a timely-filed answer, but it is a near certainty that the ALJ would not have accorded it any weight, because the prosecution itself was and is the best notice of the Department's understanding of its position. Loss of cattle and financial hardship to the owner, and nothing more, would not signify a “settlement” to an adult person of reasonable understanding.

B. Separate Violations from the Same Set of Circumstances and Facts Arising on the Same Day Do Not Place Respondent in Double Jeopardy.

First of all, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution (the Clause) only applies essen-

tially to criminal proceedings.⁶ This is an administrative proceeding to assess a civil penalty, is civil in nature, and not subject to the Clause. Nevertheless, even if the Clause were determined to apply here, it would not help respondent, because the facts here do not fit within the protection of the Clause, as construed by the Federal Courts.

The Clause protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense.⁷ Respondent was found to have moved seven cattle interstate on January 8, 1985, both without the required *certificate* (Finding 2) and without the required *permit for entry* (Finding 3). Additionally, respondent was found to have moved approximately 10 cattle interstate on April 1, 1985, both without the required *certificate* (Finding 4) and without the required *permit for entry* (Finding 5). Respondent asserts incorrectly that Findings 2 and 3 are the same offense, and that Findings 4 and 5 are the same offense, respectively. This follows because a single transaction may contain distinct offenses without violating the Clause.⁸ The Supreme Court has long held the view⁹ that two offenses are not the same for double jeopardy purposes if one requires proof of a fact that the other does not. Findings 2 and 3, and 4 and 5, respectively, each require proof of an additional fact which the other does not. Thus, the Double Jeopardy Clause does not apply in these factual circumstances.

C. Respondent's Financial Situation Has No Bearing on the Civil Penalty Assessed.

The Secretary of Agriculture is authorized to assess a civil penalty of not more than \$1,000 per violation of the regulations under the Act (21 U.S.C. § 122). Respondent's failure to answer the complaint deems all material allegations admitted by respondent, and

⁶ See, *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Breed v. Jones*, 421 U.S. 519, 528 (1975); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 282, 285-86 (1972).

⁷ See, *Ohio v. Johnson*, 467 U.S. 493, 499-500 (1984); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 306-07 (1984); *Illinois v. Vitale*, 447 U.S. 410, 415-16 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

⁸ See, *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *United States v. Ramos*, 666 F.2d 469, 476 (11th Cir. 1982); *United States v. Barton*, 647 F.2d 224, 234 (2d Cir. 1981).

⁹ *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Flittie v. Solem*, 751 F.2d 967, 970 (8th Cir. 1985); *United States v. Colmenares-Hernandez*, 659 F.2d 39, 43 (5th Cir.), cert. denied, 454 U.S. 1127 (1981); *United States v. Garner*, 529 F.2d 962, 971 (6th Cir. 1975).

neither the record nor the respondent's appeal shows any reason whatsoever to question the decision below.

Moreover, it has consistently and routinely been held that an unsubstantiated, alleged inability to pay a civil penalty, which is otherwise statutorily proper for the Secretary to assess, is not relevant. *In re Crowder*, 40 Agric. Dec. 704, 704 (1981) (order denying petition to modify order); *In re Wall*, 38 Agric. Dec. 1437, 1450-51 (1979), *aff'd in part and rev'd in part*, No. 79-3714 (6th cir. July 10, 1981) (unpublished order), *printed in* 40 Agric. Dec. 927 (1981); *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

The civil penalty assessed here is modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984); *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.⁴ (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

⁴ Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-68). For example, in 1980, the Federal Government spent \$73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success

of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Leonard McDaniel is assessed a civil penalty of \$4,000 (\$1,000 per violation), which shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Thomas E. Bundy, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 90 days after service of this order.

In re: JAMES BLACKWELL, CORNHUSKER PACKING COMPANY, DUBLIN AUCTION SALES, INC., GEORGETOWN COMMISSION COMPANY, HAMILTON LIVESTOCK COMMISSION, INC., and WALDRUP LIVESTOCK AUCTION, INC. AQ Docket No. 280. Decided December 8, 1986.

Civil Penalty—Consent

Respondent consented to the issuance of this decision and was assessed a civil penalty of \$250.

Andrea R. Bateman, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Hamilton Livestock Commission, Inc., *et al.*, violated the Act and regulations promulgated thereunder (9 CFR § 71.1, *et seq.*). Respondent Hamilton Livestock Commission and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, only respondent Hamilton Livestock Commission Company admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the Complaint, admits to the Findings of Fact set forth below and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Hamilton Livestock Commission Company also waives any action against the United States Department of Agriculture under Equal Access to Justice Act of 1980 (5 U.S.C. 504, *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

3. Complainant agrees that this Consent Decision and Order fully and finally precludes complainant from proceeding in any manner against respondent in connection with alleged violations of 9 CFR § 71.18 with respect to all transactions occurring prior to the date this Consent Decision and Order become effective.

FINDINGS OF FACT

1. Hamilton Livestock Commission, Inc., respondent, is a corporation whose business address is Hamilton, Texas 76531.

2. On or about July 6, 1985 the respondent moved interstate from Hamilton, Texas to Omaha, Nebraska approximately fourteen (14) cattle.

CONCLUSIONS

Respondent, Hamilton Livestock Commission Company, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding such Order and Decision will be issued.

ORDER

Respondent Hamilton Livestock Commission Company is assessed a civil penalty of Two Hundred Fifty Dollars (\$250.00) which shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to Andrea R. Bateman, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C.

20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondent.

In re: WILLIAM J. HANKINS, D.V.M. VA Docket No. 39. Decided December 8, 1986.

Issuing certificates without accurately completing—Veterinary accreditation revoked.

Respondent signed certificates or reports without ascertaining that they were accurately completed; respondent failed to carry out the duties and responsibilities in accordance with regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, because in connection with signing and issuing health certificates, respondent failed to record the brucellosis tests of the cattle listed thereon. Such violations can cause the spread of disease. Respondent's veterinary accreditation is revoked.

Thomas Bundy, for complainant.

Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This proceeding was instituted under the Regulations for Accredited Veterinarians (9 CFR 160.1 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated the Standards for Accredited Veterinarians (9 CFR 161.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on May 13, 1986.

Pursuant to section 1.186 of the Rules of Practice applicable to this proceeding (7 CFR § 1.186), respondent was informed in the complaint and the letter of service that his answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.186 and 1.189 of

the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. William J. Hankins, herein referred to as the respondent, is an individual whose address is Box 506, Middleburg, Indiana 46450.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Indiana under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160-162.

3. Respondent signed certificates or reports without ascertaining that they were accurately completed because (1) on or about July 16, 1984, respondent signed Brucellosis Calfhood Vaccination Record Nos. 05173 thru 05175, certifying that the cattle listed thereon of Cleo Lambricht of Shipshewana, Indiana, were 5 and 6 months of age; (2) on or about August 16, 1984, respondent signed Brucellosis Calfhood Vaccination Record No. 426599 certifying that the cattle listed thereon of Cleo Lambricht of Shipshewana, Indiana, were 4 to 10 months of age; and (3) on or about September 5, 1984, respondent issued Indiana Health Certificate Nos. 32-77879 thru 32-778799 for the interstate movement of cattle from Cleo Lambricht, Shipshewana, Indiana, to Mike Thor, Lockwood, Missouri, indicating that the cattle listed thereon were 16 to 17 months of age when, in truth and in fact, many of such cattle were the same cattle for which respondent signed and issued the aforementioned Brucellosis Calfhood Vaccination Records.

4. Respondent, on or about September 5, 1984, did not carry out all of his responsibilities under the applicable Federal programs and cooperative programs in accordance with regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, or both, because respondent, in connection with his signing and issuance of Indiana Health Certificates Nos. 32-778795 thru 32-778799 failed to record the brucellosis vaccination status or the date and results for the brucellosis tests of the cattle listed thereon, as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, respondent has violated the Standards for Accredited Veterinarians. Violations such as respondent's go to the heart of the accredited

veterinarian program and undermine credibility in the program. Such violations can also cause the spread of animal disease. Therefore, the following order is issued.

ORDER

Respondent's veterinary accreditation is hereby revoked. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 8, 1986.—Ed.]

In re: HERBERT H. STERNER. AQ Docket No. 261. Decided December 11, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$450.

Kevin B. Thiemann, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Herbert H. Sterner, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Herbert H. Sterner, respondent, is an individual whose address is 111 Kindig Road, Littlestown, Pennsylvania 17340.

2. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Littlestown, Pennsylvania to Emmitsburg, Maryland.

3. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Emmitsburg, Maryland to Bealton, Virginia.

4. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Bealton, Virginia to Littlestown, Pennsylvania.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars (\$450.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable in monthly installments of fifty dollars (\$50.00). Payments will be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403. The first payment shall be due within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

*In re: K KENNELS INTERNATIONAL and THOMAS KRUEGER. AWA
Docket No. 378. Decided November 10, 1986.*

Civil Penalty—Consent

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$1500 and ordered to cease and desist violating the Act and regulations and standards thereunder.

M. Bradley Flynn, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) K-Kennels International is a business with its principal place of business located at U.S. Route 50, Chantilly, Virginia 22021. Its mailing address is Post Office Box 213, Chantilly, Virginia 22021.

(b) Respondent K-Kennels International was a registered intermediate handler under the Act at all times material herein.

(c) Respondent Thomas Krueger is an individual with his principal place of business located at U.S. Route 50, Chantilly, Virginia 22021. His mailing address is Post Office Box 213, Chantilly, Virginia 22021.

(d) Respondent Thomas Krueger, at all times material herein, was the president and owner of K-Kennels International, and managed, directed, and controlled the activities of K-Kennels International.

(e) Respondent Thomas Krueger is and at all times material herein was an intermediate handler under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondents K-Kennels International, its officers, directors, agents, and employees, and Thomas Krueger, his agents and employees, directly or indirectly through any corporation, trust, or any device whatsoever, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder. In particular, respondents shall not:

a. Transport dogs in primary enclosures which are not large enough to insure that each animal has sufficient space to stand and sit erect and to lie in a natural position;

b. Transport dogs in primary enclosures which contain an insufficient quantity of absorbent litter;

c. Otherwise violate section 3.12 of the standards (9 CFR § 3.12);

d. Transport dogs in a truck whose cargo space lacks sufficient air conditioning to protect the health and ensure the comfort and safety of the dogs therein;

e. Maintain the cargo space of a truck used to transport dogs in a manner to allow the ingress of exhaust fumes and gasses;

f. Transport dogs in a truck whose cargo space and the positioning of the primary enclosures therein denies the dogs sufficient air for normal breathing;

g. Otherwise violate section 3.13 of the standards (9 CFR § 3.13);

h. Fail to provide dogs with water during transport;

i. Otherwise violate section 3.14 of the standards (9 CFR § 3.14);

j. Fail, while transporting dogs, to assure that the dogs receive adequate air ventilation, to maintain ambient air temperatures within prescribed limits to determine whether any of the dogs are in obvious physical distress, and to provide needed veterinary care;

k. Transport in commerce dogs in obvious physical distress; and

l. Otherwise violate section 3.15 of the standards (9 CFR § 3.15).

2. Respondents are hereby assessed jointly and severally a civil penalty of \$1,500 to be paid by certified checks and/or money orders made to the order of the Treasurer of the United States. Payment is due on the following schedule:

a. The sum of \$500 is due on or before October 31, 1986;

b. An additional sum of \$500 is due on or before November 30, 1986; and

c. A further payment of \$500 is due on or before December 31, 1986.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: VADEN WISE. AWA Docket No. 413. Decided November 10, 1986.

Civil Penalty—Consent

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$1000 and ordered to cease and desist from violating this Act and the regulations and standards thereunder.

M. Bradley Flynn, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) Mr. Vaden Wise, hereinafter referred to as respondent, is an individual doing business as "The Farm."

(b) The respondent, at all times material herein, was located at Route 2, Box 65, Gonzales, Louisiana 70737.

(c) The respondent, at all times material herein, was a licensed dealer (License No. LA-B-13) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent, his agents, employees, and assigns acting directly or indirectly through any corporation, trust, or device whatsoever, shall cease and desist from violating any and all provisions of the Animal Welfare Act and the regulations and standards issued thereunder. In particular, respondent shall cease and desist from:

(a) Failing to make, keep, and maintain a system of records which fully and correctly discloses the name and address of the person from whom each dog or cat under respondent's control was acquired or purchased; and

(b) Otherwise failing to comply with section 2.75 of the regulations (9 CFR § 2.75).

2. Respondent is hereby assessed a civil penalty of \$1,000 payable by certified check or money order payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: WILLIAM FRYE d/b/a B & H RABBITRY. AWA Docket No. 409.
Decided December 11, 1986.

Civil Penalty—Consent

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$2000. Respondent's license was suspended for a period of six (6) months.

Robert M. Frisby, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture, alleging that respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. William Frye, hereinafter referred to as the respondent, is an individual doing business as B & H Rabbitry and his mailing address is Post Office Box 3035, Gaithersburg, Maryland 20878.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 51-AR) issued under the Act.

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent William Frye shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate device, shall cease and desist from failing to:

- 1) Keep his facilities in structurally sound condition and protect rabbits from predators as required by 9 CFR § 3.50(a);
- 2) Store properly rabbit feed as required by 9 CFR § 3.50(c);
- 3) Remove animal waste as required by 9 CFR § 3.50(d);
- 4) Provide adequate shelter from wind and cold for rabbits as required by 9 CFR § 3.52(c);
- 5) Repair or replace rusty rabbit cages, racks, and metal clips as required by 9 CFR § 3.53(a);
- 6) Provide adequate food and water for rabbits as required by 9 CFR §§ 3.54(a) and 3.55;

7) Remove debris and excreta from the premises and from containers under rabbit cages with mesh floors as required by 9 CFR §§ 3.56(a) and (c);

8) Hire a sufficient number of employees as required by 9 CFR § 3.57; and

9) Establish and maintain a program of veterinary care supervised by a doctor of veterinary medicine and provide veterinary care for sick rabbits as required by 9 CFR § 3.59.

Respondent is hereby assessed a civil penalty of \$2,000, suspended provided the respondent complies with the Act and the regulations and standards issued thereunder. If, after notice and hearing, the respondent is found to have violated the Act or the regulations and standards issued thereunder, this \$2,000 shall become due and payable by certified check or money order made payable to the Treasurer of the United States.

Respondent's license is suspended for six (6) months and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: STANLEY and LINDA WAGNER d/b/a WAGNER'S REGISTERED DOGS. AWA Docket No. 400. Decided October 31, 1986.

Licensed dealers—Protection of food supplies—Interior surfaces impervious to moisture—Cleaning of enclosures—Insect control—Civil penalty—Suspension of license.

John D. Griffith, for complainant.

Marvin W. Quinlan, Jr., Bozeman, Montana, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Animal Welfare Act, as amended, 7 U.S.C §§ 2131-2156, herein referred to as the Act, in-

stituted by a complaint filed April 24, 1986, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that the respondents willfully violated the Act and regulations and standards promulgated thereunder, 9 CFR §§ 1.13-3.142. The case was assigned to this Administrative Law Judge on October 28, 1986.

Copies of the complaint and Rules of practice, 7 CFR §§ 1.130-1.151, governing proceedings under the Act were served May 8, 1986, upon respondents by the Hearing Clerk by certified mail. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

On May 23, 1986, an Order Granting Extension of Time to Respond to Complaint was filed in the case granting the respondents 20 days after service of the Order to respond. The respondents were served the Order by certified mail on June 10, 1986.

Respondents have failed to file an answer within the time prescribed in the Order Granting Extension of Time to Respond to Complaint and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 CFR § 1.139.

FINDINGS OF FACT

1. Stanley and Linda Wagner are partners whose address is P. O. Box 420, Baker, Montana.

2. The respondents, at all times material herein, were operating a dog kennel and were dealers within the meaning of the Act. The respondents, at all times material herein, were licensed as required by the Act.

3. APHIS inspected the respondents' facility on September 17, 1985, and found the following willful violations of section 2.100 of the regulations, 9 CFR § 2.100, and the standards specified below:

(a) Supplies of food were stored in facilities which did not provide adequate protection from infestation and contamination by vermin in violation of 9 CFR § 3.1;

(b) Interior surfaces needed resurfacing and repainting and were not substantially impervious to moisture in violation of 9 CFR § 3.2;

(c) Primary enclosures were not being sanitized often enough, allowing debris and other hazardous material to accumulate in violation of 9 CFR § 3.7;

(d) The premises were not being properly cleaned in violation of 9 CFR § 3.7; and

(e) No effective program for the control of insects had been established and maintained in violation of 9 CFR § 3.7.

CONCLUSIONS

By reason of the facts set forth in the Findings of Fact above, the respondents have willfully violated section 2.100 of the regulations, 9 CFR § 2.100, and the specified standards.

ORDER

Respondents Stanley and Linda Wagner, their agents and employees, directly or through any corporate or other device, shall cease and desist from failing to:

1. Provide adequate protection for supplies of food from infestation and contamination by vermin as required by 9 CFR § 3.1;
2. Maintain interior surfaces so that they are substantially impervious to moisture as required by 9 CFR § 3.2;
3. Clean and sanitize primary enclosures often enough to prevent debris and other dangerous materials from accumulating as required by 9 CFR § 3.7; and
4. Establish and maintain an effective program for the control of insects as required by 9 CFR § 3.7.

The respondents Stanley and Linda Wagner are assessed a civil penalty of \$200.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

Respondents' license is suspended for thirty (30) days and thereafter until respondents demonstrate to the Animal and Plant Health Inspection Service (APHIS) that they are in compliance with the Act and the regulations and standards thereunder. When respondents demonstrate that they are in compliance with the Act and the regulations and standards, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension after the expiration of the thirty-day period.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 CFR §§ 1.130-1.151, unless appealed within 30 days after service.

Copies hereof shall be served upon the parties.

[This default decision and order became final December 26, 1986.—Ed.]

In re: JIMMY MARTIN. HPA Docket No. 189. Decided November 5, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$700 and were disqualified from showing or exhibiting or permitting as owner the showing or exhibiting of any horse for a period of six (6) months.

Robert M. Frisby, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Horse Protection Act ("Act"), as amended, 15 U.S.C. §§ 1821–1831, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

Jimmy Martin admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Jimmy Martin, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 54, Cornersville, Tennessee 37047.

B. At all times material herein, the respondent was the owner and trainer of "Evil Streaker" and entered for the purpose of offering for sale that horse as Exhibit No. 45 on January 11, 1986, at the 14th Annual Colts of the Future Sale at Murfreesboro, Tennessee.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmy Martin is assessed a civil penalty of \$700 payable by certified check or money order made to the order of the Treasurer of the United States.

Respondent Jimmy Martin is disqualified from showing or exhibiting or permitting as owner the showing or exhibiting of any horse for six (6) months.

The provisions of this order shall be effective from November 1, 1986, to April 30, 1987.

Copies of this decision shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: JEFF V. PALMER. P&S Docket No. 6640. Decided June 23, 1986.

Dealer—Insufficient funds checks—Failure to pay when due—Suspension of registration.

Andrew Y. Stanton, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Jeff B. Palmer, doing business as Palmer Cattle Company, hereinafter referred to as respondent, is an individual whose mailing address is P. O. Box 10041, Fresno, California 93745.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. The respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock, and in purported payment for such livestock, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account to pay such checks when presented.

3. (a) The respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, and in the transaction set forth in paragraph III(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of October 31, 1985, there remained unpaid a total of \$103,962.37 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondent wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Jeff V. Palmer, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price for live stock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of ten years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 120 day period of suspension.

This decision and order shall become final and without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Default decision and order became final November 3, 1986.—Ed.]

In re: VALLEY MEATS, INC. P&S Docket No. 6753. Decided November 3, 1986.

Packer—Insufficient Funds—Consent.

Respondents consented to the issuance of this decision and order in which they were ordered to cease and desist from purchasing livestock while its current liabilities exceeded its current assets.

Sharlene Lassiter, for complainant.

Michael Offner, Red Cloud, Nebraska, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Valley Meats, Inc., also doing business as Meats & More, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Nebraska. Its business mailing address is P. O. Box 249, Red Cloud, Nebraska 68970.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device shall cease and desist from purchasing livestock while its current liabilities exceed its current assets unless respondent pays for such livestock purchases in U.S. currency, cashier's check or wire transfer.

The provisions of this order shall become effective on the first day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: BRUCE CARTWRIGHT. P&S Docket No. 6742. Decided November 6, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$500 and ordered to cease and desist from engaging in business without filing and maintaining adequate bond as required by the Act and regulations thereunder.

Edward M. Silverstein, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary

has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bruce Cartwright, hereinafter referred to as the respondent, is an individual whose business mailing address is 2205 Beckett Street, Bossier City, Louisiana 71111.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bruce Cartwright, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RONNYE RICHARDS. P&S Docket No. 6750. Decided November 6, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$500 and ordered to cease and desist from engaging in business without filing and maintaining adequate bond as required by the Act and regulations thereunder.

Thomas C. Heinz, for complainant.

Jim Camp, Sparta, Tennessee, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronnye Richards, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 606, Sparta, Tennessee 38588.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ronnye Richards, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: TOWN AND COUNTRY MEATS, INC., LARRY MEYER and BARBARA MEYER. P&S Docket No. 6741. Decided November 7, 1986.

Packer—Issuing checks without sufficient funds—Failure to pay when due.

Respondents consented to the issuance of this decision in which they were ordered to cease and desist from issuing checks for payment without maintaining sufficient funds and failing to pay for purchases when due.

ster Train, for complainant.

espondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and con-

sent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Town and Country Meats, Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is 220 N.W. 2nd Street, Pipestone, Minnesota 56164.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Larry Meyer and Barbara Meyer, hereinafter referred to as the individual respondents, are individuals whose business address is 220 N.W. 2nd Street, Pipestone, Minnesota 56164.

4. The individual respondents at all times material herein were:

(a) Owners of the corporate respondent;

(b) Jointly responsible for the management, direction and control of the corporate respondent; and

(c) Packers within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Town and Country Meats, Inc., its successors, officers, directors, agents and employees, and the individual respondents Larry Meyer and Barbara Meyer, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies of this decision shall be served upon the parties.

In re: JOHN CLAY & COMPANY OF OGDEN, UTAH, RAYMOND C. WILLIAMS, and LEWIS E. HARPER. P&S Docket No. 6216. Decided October 1, 1986.

Dealer—Insufficient funds drafts—Issuing drafts in payment for livestock—Failing to pay when due—Suspended as a registrant.

Respondents John Clay & Company of Ogden, Utah and Raymond C. Williams issued unauthorized drafts in payment for livestock, failed to honor such drafts when presented for payment, and failed to pay, when due, for livestock purchased. Respondents were suspended as registrants under the Act.

Eric Paul, for complainant.

Michael V. Mulchay, Phoenix, Arizona, for respondents.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

The proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed on November 16, 1983, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent, John Clay & Company of Ogden, Utah, failed to meet the financial requirements of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*, "the Act") and that the corporate respondent and the individual respondents who are its principal officers, each willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was served on each of the respondents, and service on the corporate respondent was accepted on its behalf by respondent Lewis E. Harper, its President, and by respondent Raymond C. Williams, its Vice President and Treasurer. An answer was filed by respondent Williams on January 3, 1984, and separate answer was filed by respondent Harper on December 30, 1983. Neither of these individual respondents filed an answer on behalf of respondent Clay, which had ceased operations after seeking relief under the provisions of the United States Bankruptcy Code in May 1983. These proceedings were then deferred at complainant's request, to allow claims being litigated in other forums to be settled. On February 5, 1986, a consent decision was entered against respondent Harper which suspended him as a registrant under the Act for one year, which became effective, *nunc pro tunc*, on January 1, 1985.

An oral hearing was held before me on June 3 and 4, 1986, in Phoenix, Arizona. Respondent Williams was represented by attorneys Joseph K. Brinig and Michael V. Mulchay. Complainant was represented by Eric Paul, Office of the General Counsel, United States Department of Agriculture. No appearance was entered on behalf of respondent Clay and the allegations of the complaint stand admitted by this respondent by reason of its failure to answer and appear [TR 10; 13].

Respondent Williams admitted, in whole and in part, by his answer, certain of the jurisdictional and substantive allegations, including the insolvency of respondent Clay and the failure of respondent Clay to meet the financial requirements of the Act (7 U.S.C. § 204) by reason of such insolvency. Briefing was completed on September 15, 1986.

An order is being entered against respondents requiring respondent Clay to cease and desist from various practices pertaining to its failure to pay, in full, livestock sellers; suspending respondent Clay as a registrant under the Act for one year and thereafter until it demonstrates it is no longer insolvent; and suspending respondent Williams as a registrant under the Act for sixty (60) days.

FINDINGS OF FACT

1. John Clay & Company of Ogden, Utah, ("John Clay") is a corporation whose principal place of business was located in Ogden, Utah. John Clay's mailing address was P. O. Box 507, 3636 Rear Washington Boulevard, Ogden, Utah 84402.

2. John Clay, at all times material herein, was:

(A) Engaged in the business of buying and selling livestock in commerce on its own account and buying livestock in commerce on a commission basis; and

(B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. On May 11, 1983, John Clay filed on Chapter 11 petition in bankruptcy in the United States Bankruptcy Court for the District of Utah, Central Division. On or about May 27, 1983, John Clay converted its Chapter 11 case to a Chapter 7 case in bankruptcy.

4. As a result of John Clay's liquidation in bankruptcy, John Clay's current liabilities presently exceed its current assets and, as of December 31, 1982, current liabilities exceeded current assets in the amount of \$49,959.38.

5. By reason of the above facts, the financial condition of John Clay does not meet the requirements of the Act.

6. For approximately 20 years, John Clay purchased and sold livestock, primarily sheep, in commerce. John Clay would buy live-

stock from producers and resell it either to feeders or packers, assuming in the interim the risks of loss if damage to the animals occurred. Often these transactions were handled on an order buying basis, and therefore involved little speculation on John Clay's part. These transactions always involved a mark-up, usually 50 cents per hundredweight.

7. Raymond C. Williams ("Williams") is an individual whose mailing address is 7840 N. Seventh Street, Phoenix, Arizona 85020.

8. Respondent Williams is, and at all times material herein was:

(A) Vice President, Treasurer and owner of 29% of the stock of John Clay;

(B) A dealer within the meaning of and subject to the Act; and

(C) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

9. John Clay officials were responsible for certain specific segments of the corporation's business. Williams and Lewis E. Harper ("Harper") were "field men." Basically, Williams and Harper were out in the country negotiating to buy and sell livestock. Mr. Frank Rynders ("Rynders") was in charge of the office. Rynders coordinated the daily financial business of the corporation, including accounting and various banking transactions.

John Clay had the following officers and shareholders:

Lewis E. Harper—President and a 29% shareholder.

Raymond C. Williams—Vice President/Treasurer and a 29% shareholder.

Roy Shurtz—Vice President/Secretary and a 29% shareholder.

Frank Rynders—A 13% shareholder.

10. Williams and Harper had worked together in one form or another for approximately 25 years. Williams found Harper to be a highly competent livestock dealer who, in 25 years, never gave Williams any reason to distrust him. Williams and Rynders had a business relationship for approximately 20 years. Williams' relationship with Rynders was extremely good. Williams found Rynders' services to be very good; he believed Rynders to be the best in the business and never had reason to doubt business information given him by Rynders.

11. John Clay had dealt with The Commercial Security Bank ("bank") for nearly 20 years. John Clay personnel had individually dealt with the bank (i.e., personal loans, home loans, automobile loans) for nearly 20 years. John Clay was the bank's second largest account. From 1960 through 1983, John Clay sent \$600-800 million

through the bank. Also, John Clay officials had a close personal relationship with various bank officials.

12. Williams' normal business practice was to contact Rynders every day respecting upcoming purchases and/or sales and the company's financial status regarding these transactions. During the period of time covered by the complainant, Williams continued this practice. Williams was repeatedly assured by Rynders that, based on discussions with the bank officials, the drafts being issued were sufficiently covered.

13. John Clay lost a lawsuit and was adjudged liable for about \$300,000 in damages. When it appealed the decision, John Clay entered into a supersedeas bond with Aetna Insurance Company that was secured by the company's funds, and also a personal indemnification executed by various John Clay personnel (including Williams). In April 1983, John Clay lost its appeal.

14. Between May 7, 1983 and May 19, 1983, Williams personally handled the buying of sheep from producers in Arizona for resale to packers and dealers located in Colorado. He accepted delivery from 6 Arizona sheep growers of animals having a combined purchase amount of \$581,876.25 and in payment drew drafts on John Clay that were returned "refused" by Commercial Security Bank. In each instance, Williams had agreed to a specific purchase price per pound, with the live weight to be determined on delivery and weighing only after he had obtained a resale commitment. These transactions are set forth in the following table:

Sale Date 1983	Name of Seller	No. of Sheep	Amt. of Pur- chase
5/7	Wilaha Sheep Co.	42	\$2,198.67
5/9-10	Wilaha Sheep Co.	2,150	151,473.06
5/11	Wilaha Sheep Co.	76	
		2,268	\$162,997.53
5/11	Auza Bros., Inc.	836	\$62,582.80
5/16	Auza Bros., Inc.	1,366	93,631.16
5/19	Auza Bros., Inc.	83	5,978.78
		2,285	\$162,192.74
5/11	Manterola Sheep Co., Inc.	578	\$39,228.64
5/18	Manterola Sheep	1,196	85,037.96
			-246.96
			\$124,019.64
5/12	Long Tom Sheep	548	\$15,850.00
5/16	Antonio Echandi	390	25,707.68

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Sale Date 1983	Name of Seller	No. of Sheep	Amt. of Pur- chase
		125	1,949 25
		515	\$27,656.93
5/16	Jean Arriaga	908	\$62,643.56
5/19	Jean Arriaga	561	24,334.30
			2,181.55
		1,464	\$89,159.41

15. Williams arranged for trucks to pick up the sheep set forth in the table above and to take them to scales for weighing. The procedure followed involved the prior weighing of the empty trucks; the sorting and loading of animals at the sellers' ranches; and the weighing of the loaded trucks. Upon such weighing, the sheep producers had completed their delivery and the risk of loss passed to John Clay until accepted by John Clay's customer who had agreed to buy the sheep F.O.B. Colorado. Except in one instance involving the purchase of Manterola sheep on May 11, 1983, where Williams was not present at the time the lambs were loaded and weighed, he drew a draft on the spot in the purchase amount that was computed upon completion of the weighing and handed it to the seller.

16. The drafts drawn on the bank account of John Clay were credit instruments in that they contained the following language:

Payable Through
Commercial Security Bank
Ogden, Utah

They were coded with bank code numbers that enabled them to be processed through banking channels in the same manner as checks, but such instruments do not constitute payment until the date they are honored upon presentation to the drawee's bank. The sheep producers set forth in the table contained in Finding 14 above, had not been asked to sign any agreements authorizing the use of drafts. However, it is the usual course of business in Arizona to use drafts for purchases of sheep.

17. John Clay filed a petition seeking relief pursuant to Chapter 11 of the United States Bankruptcy Code on May 11, 1983. This filing occurred at 12:56 p.m. Mountain Standard Time (Arizona Time), while Williams was accepting delivery of sheep from Arizona producers. Williams had no knowledge of the actual filing until

later that day, although he was aware an attorney had been hired for advice.

18. Williams thereafter was aware of the Chapter 11 bankruptcy filing on behalf of John Clay. Williams' understanding of the Chapter 11 Bankruptcy filing was that it was a vehicle which allowed the company to continue its operations and thus meet its obligations. Williams relied on assurances from Rynder that, even after the Chapter 11 filing, his purchases and the drawing of drafts posed no problem.

19. Ultimately, the producers, as a result of the bankruptcy proceedings, recovered all but approximately ten percent of the money due them.

20. The return of drafts drawn on John Clay by the Commercial Security Bank on or about May 20, 1983, was the direct cause of the conversion of the Chapter 11 proceeding to the Chapter 7 proceeding on May 27, 1983.

21. Williams had no actual advance knowledge that Commercial Security Bank, in spite of the Chapter 11 filing with its attendant automatic stay, would refuse to honor the drafts he issued to producers.

22. Respondent Williams is currently employed on a salaried basis by Jack Taylor, a former employee of respondent Clay who handled the firm's California purchases. Except for a lack of ownership by respondent Williams, the Jack Taylor operation is an admitted successor to the sheep business of respondent Clay. Respondent Williams testified that it did an annual volume of \$12 million to \$13 million in purchases, that 60% to 70% of this volume was in Arizona just as had been the case with respondent Clay and that, for the most part, Jack Taylor serves the same customers as respondent Clay.

RULINGS ON PROPOSED FINDINGS AND CONCLUSIONS

All proposed findings and conclusions by either party not incorporated and adopted as part of the findings and conclusions, have been rejected as contrary to the relevant, material and substantial evidence of record.

CONCLUSIONS

1. Respondent John Clay violated the Act, and its financial condition requires the indefinite suspension of its registration until such time, after the expiration of a one year period of time, when it can demonstrate it is no longer insolvent.

2. Under controlling policies of the Department of Agriculture, sanctions may be imposed against respondent Williams, Vice Presi-

dent and 29% shareholder of John Clay, for John Clay's violations of the Packers and Stockyards Act.

3. The Arizona sheep transactions handled by respondent Williams for John Clay, were dealer transactions in which John Clay assumed all risk of loss until the sheep were accepted by the ultimate purchaser.

4. The issuance of unauthorized drafts to pay for livestock instead of sufficient fund checks, and the failure to pay for livestock in full, constitutes wilful violations of the Act by John Clay, that were participated in by respondent Williams for which, in accordance with the Department's sanction policy, his personal registration as a dealer should be suspended for sixty (60) days.

DISCUSSION

Complainant has requested the issuance of a cease and desist order, and the suspension of John Clay as a registrant under the Act for a minimum of one year and thereafter until it demonstrates it is no longer insolvent. This Order is fully warranted, is not a matter of controversy and is being entered.

The real controversy concerns what sanctions, if any, should be imposed on respondent Raymond C. Williams. Mr. Williams has impressed me as being a completely credible and truthful witness. His attorneys' brief has likewise impressed me as being comprehensive and most persuasive.

I agree with Mr. Williams' counsel that a one year suspension of Williams' dealer registration, as requested by complainant, would be most inappropriate and contrary to the ends of justice. Complainant's arguments that a sanction of this length is needed because the transactions were those of a market agency having special fiduciary duties to sellers, is contrary to the facts. Williams issued John Clay's drafts on the spot and John Clay thereupon assumed all responsibility for loss or rejection of the sheep until their actual acceptance by ultimate purchasers. Those facts show the transactions to be dealer transactions. See *Daugherty v. White*, 331 F.2d 94, 95-96 (10th Cir. 1964); and *Hines*, 35 Agric. Dec. 113, 12 (1976).

On the other hand, under well-established policies of the Department set forth in the various cases advanced by complainant and discussed by respondent, sanctions do lie against a corporate officer's personal registration when the corporation has violated the Act. See *MCM Livestock Inc.*, 39 Agric. Dec. 893, 901 (1980); and *Farmers & Ranchers Livestock Auction, Inc.*, P. & S. Docket No. 6483, 45 Agric. Dec. —, (2/27/86 slip opinion at pp. 24-25).

Respondent Williams has argued that he cannot be said to have wilfully participated in any violation of the Act since he relied on assurances by Frank Rynders when he issued drafts for livestock after John Clay had filed in bankruptcy. However, as a registrant under the Act, Williams was required to do more. *See e.g., Garver*, P. & S. Docket No. 6449, 45 Agric. Dec. —, (6/19/86 slip opinion). He should have consulted Packers and Stockyards officials for an official position or have directly consulted his own attorney for reliable advice. A registrant under the Act is not absolved by his reliance upon erroneous advice. *See George Steinberg and Son v. Butz*, 491 F.2d 988, 994 (2nd Cir.), *cert. denied*, 419 U.S. 880 (1974); and *Shatkin*, 34 Agric. Dec. 296, 298-300 (1975).

Upon reviewing past decisions by the Department, a sixty (60) day suspension of Williams' personal license appears warranted and appropriate in the circumstances.

Accordingly, the following Order is hereby entered.

ORDER

Respondent John Clay & Company of Ogden, Utah, its directors, officers, employees, agents, successors and assigns, and respondent Raymond C. Williams, directly or through any corporate or other device, shall cease and desist from:

1. Issuing drafts in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such drafts when presented;
2. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;
3. Issuing drafts which are not checks in payment for livestock purchased on a cash basis;
4. Failing to pay, when due, the full purchase price of livestock purchased.

Respondent John Clay & Company of Ogden, Utah, is suspended as a registrant under the Act for a period of one year and thereafter until it demonstrates that it is no longer insolvent. When respondent Clay demonstrates it is no longer insolvent, a supplemental order shall be issued in this proceeding terminating the suspension, after the expiration of the one-year period.

Respondent Raymond C. Williams is suspended as a registrant under the Act for a period of sixty (60) days.

The provisions of this Order shall become effective 35 days after service of this Order on the respondents, unless appealed within 30 days after service (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision shall be served upon the parties. Service on respondent Clay shall be effected by service on its Vice President and Treasurer, respondent Williams.

[This decision and order became final November 12, 1986.—Ed.]

In re: LEFFLER BROS., INC., FRED G. STERNAU and ALAIN FOSTER.
P&S Docket No. 6650. Decided November 14, 1986.

Civil Penalty—Consent.

Respondents consented to the issuance of this decision in which they were assessed a civil penalty of \$1000 and ordered to cease and desist from failing to pay for purchases when due, and issuing checks for payment without maintaining sufficient funds.

Allan Kahan, for complainant.

Respondents, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO LEFFLER BROS., INC. AND FRED G. STERNAU

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Leffler Bros., Inc. and Fred G. Sternau admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they apply to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leffler Bros. Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of New York. Its business mailing address is 147-12 95th Avenue, Jamaica, New York 11435.

2. The corporate respondent is, and at all times material herein was:

In re: LYNN ROSE. P&S Docket No. 6616. Decided November 17, 1986.

Dealer and Market Agency—Engaging in business while insolvent—Failure to pay when due—Consent.

Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business without filing and maintaining adequate bond; issuing checks for payment without maintaining sufficient funds; and failing to pay for purchases when due. Respondent was further suspended as a registrant for a period of two (2) years.

Roberta Swartzendruber, for complainant.

Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lynn Rose, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 5497, Twin Falls, Idaho 83301.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis and buying and selling livestock in commerce for his own account; and

(b) Registered as a market agency and dealer under the Act, with such registration having been suspended in 1982 and remaining suspended to the present time for failure of respondent to demonstrate solvency.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Lynn Rose, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account[s] upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent Rose is presently suspended as a registrant under the Act for failure to demonstrate solvency. Respondent Rose is further suspended as a registrant under the Act in this proceeding for a period of two years and his present suspension continues until he demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements under the Act and the regulations, a supplemental order will be issued in this proceeding after the expiration of the two year suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ROSS CATTLE CO., INC., WILLIAM W. ROSS, ROBERT L. KLEIN-PETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided November 17, 1986.

Dealer—Failure to pay when due—Consent.

Respondents consented to the issuance of this decision in which they were ordered to cease and desist from failing to pay full purchase price when due and delaying payments for purchases. Respondents were further suspended as registrants and prohibited from engaging in business as a dealer or market agency for a period of 45 days.

Jory M. Hochberg, for complainant.

William W. Ross, Jackson, Mississippi, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

**CONSENT DECISION WITH RESPECT TO ROSS CATTLE CO., INC. AND
WILLIAM W. ROSS**

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C., Section 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR Section 1.138).

Respondents Ross Cattle Co., Inc. and William W. Ross admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations as they pertain to them, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ross Cattle Co., Inc. is a corporation whose business mailing address is Route 1, Box 121, Terry, Mississippi 39170.

2. Respondent Ross Cattle Co., Inc. was at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. William W. Ross is an individual whose mailing address is 1431 Chestnut Lane, Jackson, Mississippi 39212.

4. Respondent William W. Ross at all times material herein was:

- (a) President of and owner of 100 percent of the outstanding stock issued by respondent Ross Cattle Co., Inc.;
- (b) Responsible for the direction, management and control of respondent Ross Cattle Co., Inc.; and
- (c) A dealer buying and selling livestock in commerce for his own account.

CONCLUSIONS

Respondents Ross Cattle Co., Inc. and William W. Ross having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Ross Cattle Co., Inc. and William W. Ross, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and
3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Ross Cattle Co., Inc. is suspended as a registrant under the Act for a period of 45 days.

William W. Ross is prohibited from engaging in business as a dealer or market agency for a period of 45 days.

The provisions of this order shall become effective on the sixth day after service of this decision on the parties.

Copies of this decision shall be served upon the parties.

In re: DELMA M. ROGERS and JOYCE ROGERS d/b/a APACHE LIVESTOCK SALES Co. P&S Docket No. 6687. Decided November 17, 1986.

Market Agency—Failure to pay when due—Issuing payments without maintaining sufficient funds—Consent.

Respondents consented to the issuance of this decision in which they were ordered to cease and desist from failing to deposit proceeds in a Custodial Account for Shippers Proceeds; using funds received for purposes other than payment to owners, consignors, or shippers; issuing checks for payments without maintaining sufficient funds; and failing to pay proceeds to consignors when due. Respondents were further suspended as registrants for a period of five (5) years.

Ben Bruner, for complainant.
Respondents, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Delma M. Rogers and Joyce Rogers, hereinafter referred to as respondents, are individuals doing business as Apache Livestock Sales Co. Their business address is P. O. Box 390, Apache, Oklahoma.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Delma M. Rogers and Joyce Rogers, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regu-

lations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of livestock or the payment of amounts due the respondent for lawful marketing charges;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

4. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

5. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

6. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondents Delma M. Rogers and Joyce Rogers are suspended as registrants under the Act for a period of five years and thereafter until such time as they demonstrate that the deficiency in their Custodial Account for Shippers' Proceeds has been eliminated, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of eighteen (18) months upon demonstration by the respondents that all unpaid livestock consignors have been paid in full and that the deficiency in their Custodial Account for Shippers' Proceeds has been eliminated, and provided further, that this order may be modified upon application to the Packers and Stockyards Administration to permit the respondents' salaried employment by another registrant after the expiration of the eighteen (18) month period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GEORGE WATTS. P&S Docket No. 6662. Decided October 6, 1986.

Dealer—Market agency—Bonding requirement—Suspended as a registrant—Civil penalty.

Jory M. Hochberg, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

**DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) George Watts, hereinafter referred to as the respondent, is an individual doing business in Roswell, New Mexico 88201.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified on various occasions by the Packers and Stockyards Administration of the need to file and maintain a surety bond to secure the performance of his livestock obligations

under the Act. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notices, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent George Watts, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This default decision and order became final November 18, 1986.—Ed.]

In re: CIRCLE B MEAT CO., INC. d/b/a FLORIDA BONELESS BEEF and CIRCLE B PORTION MEAT CO., GEORGE E. MUELLER, SR. and JAY A. MUELLER. P&S Docket No. 6614. Decided October 7, 1986.

Packer—Question: Should one respondent be held accountable for the actions of the other respondent while divorced from day to day operations—Complaint dismissed as to respondent Jay Mueller.

Respondent Jay Mueller was divorced from the day to day operations of the corporate respondent during the period of the alleged violations and therefore should not be held accountable for actions taken by respondent George E. Mueller, Sr. Therefore the complaint, as it pertains to respondent Jay Mueller, was dismissed.

Allan R. Kahan, for complainant.

Robert L. Williams, Venice, Florida, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under Title II of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed on October 21, 1985, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that respondent Circle B Meat Company, Inc., doing business as Florida Boneless Beef and Circle B Portion Meat Co., under the management, direction and control of respondents George E. Mueller, Sr., and Jay A. Mueller, in connection with the operations of Circle B Meat Company, Inc., as a packer subject to the Act, purchased livestock for slaughter and failed to pay, when due, for said livestock; purchased livestock and in purported payment issued checks which were returned unpaid by the bank because the corporate respondent did not have sufficient funds on deposit and available in the account; failed to hold in trust inventories of livestock required to be held in trust for the benefit of all unpaid cash sellers of livestock; and willfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock. Said practices are alleged to be in wilful violation of sections 202(a), 206(b) and 409 of the Act (7 U.S.C. §§ 192(a), 196(b), 228).

On November 18, 1985, Respondent Jay A. Mueller filed a response to the Complaint and Notice of Hearing which admitted the jurisdictional allegations of the Complaint, but denied that he was responsible, with George E. Mueller, Sr., for the management, direction and control of the practices and activities of the corporate

respondent, during the period of the alleged violations, and denied the remaining allegations as they related to him.

A default decision was issued against respondents Circle B Meat Co., Inc., and George E. Mueller, Sr., on April 23, 1986, and became final and effective on June 2, 1986. As a result of this final Decision, George E. Mueller, Sr., was assessed a civil penalty in the amount of \$25,000.

An oral hearing was held on July 1, 1986, in Tampa, Florida, before Administrative Law Judge Edward H. McGrail, United States Department of Agriculture. Respondent was represented by Robert L. Williams, Esq., Venice, Florida. Complainant was represented by Allan R. Kahan, Esq., Office of the General Counsel, United States Department of Agriculture. Complainant called six witnesses, including Respondent Jay A. Mueller, and offered twenty-one (21) exhibits. Respondent called no witnesses since complainant made Respondent Jay A. Mueller his own witness, and offered no exhibits.

FINDINGS OF FACT

1. Circle B Meat Co., Inc., hereinafter referred to as the corporate respondent, is a family owned corporation organized and existing in the State of Florida, doing business as Florida Boneless Beef and Circle B Portion Meat Company. It had as its officers Jay A. Mueller, President; George A. Mueller, Sr., Vice-President, and Arthaleen Mueller, Secretary/Treasurer. Its business mailing address is P. O. Drawer 1417, Dade City, Florida 34297. (CX-1, 21, p. 2)¹

2. The corporate respondent was, at all times material herein:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(b) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(c) A packer within the meaning of the Act and subject to the provisions of the Act. (CX-1)

3. Jay A. Mueller, hereinafter referred to as Respondent Jay Mueller, is an individual whose business mailing address is 216 Carey Place, Lakeland, Florida 33803. (Respondent's Answer)

4. Respondent Jay Mueller is, and at all times material herein was:

(a) Listed as President and a director of the corporate respondent and was active in the management of the corporate respondent

¹ Reference to exhibits are designated "CX". References to the hearing transcript are designated "Tr."

until approximately August 22, 1983, at which time he, following a serious argument with his father, George E. Mueller, Sr., left the management and control of the business, received no salary from that point forward, turned in the company automobile and found other employment; and

(b) Respondent Jay Mueller did not return to the corporate business until on or about January 24, 1984, at which time the corporate respondent had filed for bankruptcy in the Bankruptcy Court, Tampa, Florida, said filing having been accomplished by his father, George E. Mueller, Sr., on January 3, 1984. (CX-21, p. 2; Tr. 123, 130-131, 134-135)

5. During Respondent Jay Mueller's absence from the day to day operation of the corporate respondent it was understood that his father, George E. Mueller, Sr. was running the corporate business. By date of January 4, 1984, the Regional Office of the Packers and Stockyards Administration (P&S), Atlanta, Georgia, sent a letter, addressed to the corporate respondent, advising that P&S had received information that the corporate respondent had failed to pay for livestock and that the corporate respondent should take immediate steps to comply with the requirements of the Act. The letter explained the requirements of the Act, as well as provided information regarding the packers obligation to establish and maintain the trust account. This letter was signed as being received at the corporate respondent's place of business on January 11, 1984, by Linda Ledford, bookkeeper for the firm. A copy of the letter was also sent to Don Stichter, Esq., who was identified as the attorney representing the corporate respondent in the bankruptcy proceeding filed in the Bankruptcy Court, Tampa, Florida, on January 3, 1984. (CXs-1, 2, pp. 3-4; CXs-11, 12, 21; Tr. 64, 68, 70-71, 114-115, 121, 127, 130-131, 135)

6. On January 5, 1984, after futile attempts by P&S to contact Respondent George E. Mueller, Sr. by telephone, Respondent Jay Mueller was contacted at his home in Lakeland, Florida, by a representative of P&S in Atlanta, Georgia. Although Respondent Jay Mueller acknowledged he was still listed as President of respondent's company, he advised he had not been active in the daily operations since the fall of 1983. The bankruptcy filing was also discussed, as well as money owed to sellers of livestock and the responsibility for protecting trust assets. The bankruptcy petition filed in the Bankruptcy Court, Tampa, Florida on January 3, 1984, was signed by George E. Mueller, Sr., as Vice-President of the corporate respondent. (CXs-5, 12, 21; Tr. 127)

7. On several occasions during the period when Respondent Jay Mueller was absent from the corporate respondent, he was request-

ed to make purchases of cattle at the Interstate Livestock Auction Market, Seffner, Florida (Interstate) by his father, George E. Mueller, Sr. Prior to such purchases, personnel of Interstate would clear authority to purchase cattle for the corporate respondent from Respondent George E. Mueller, Sr., who acknowledged he would be responsible for payment of the purchased cattle. On these occasions, Respondent Jay Mueller was not working at corporate respondent, nor receiving any pay for his limited service. Rather, he was employed by a real estate company. (CX-15-20; Tr. pp. 65-70, 98, 100-105, 131-132, 139-143)

8. (a) The corporate respondent, in connection with their operations as a packer, on or about the dates and in the transactions set forth below and at diverse other times, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock:

1988 Date of Purchase	From Whom Purchased	Amount
May 4	Little Everglade	\$176.88
Aug. 10	J. L. Overstreet	787.10
Sept. 27	Little Everglade	237.90
Oct. 20	Buck Island Ranch	7,647.81
Oct. 25	Robert Manning	2,319.26
Nov. 22	Interstate Livestock Auction	10,371.00
Nov. 30	North Florida Farmers L/S Mkt.	37,988.55
Dec. 1	Buddy Johnson	2,165.96
Dec. 6	Interstate Livestock Auction	13,508.35
Dec. 12	Jacksonville Livestock Auction	16,963.92
Dec. 18	Interstate Livestock Auction	6,799.74

(CX-2)

(b) As of August 1, 1985, there remained unpaid by the corporate respondent approximately \$130,399.30 for such livestock purchases. (CX-2)

9. Respondent George E. Mueller, Sr., and/or corporate respondent in connection with operations as a packer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefore issued checks on the corporate respondent's account which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented. (CX-3, pp. 6, 22, 30, 34, 44, 49, 58, 63):

1983 Date of Purchase	No Head	From Whom Purchased	Check No.	Amount
Sept. 28	4	J. D. Skinner	5355	\$997.44
Oct. 5	30	North Florida Farmers L/ S Mkt.	5120	9,701.36
Oct. 12	35	North Florida Farmers L/ S Mkt.	5168	10,264.72
Oct. 14	20	Cordele Livestock Co., Inc	5219	6,845.37
Oct. 19	49	North Florida Farmers L/ S Mkt.	5231	8,737.96
			5232	8,737.96
Nov. 3	4	Barthle Brothers	5342	1,058.14
Nov. 9	41	North Florida Farmers L/ S Mkt.	5326	8,286.79
			5327	8,286.81

10. The corporate respondent and/or George E. Mueller, Sr. failed to hold in trust and willfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that:

(a) On January 6, 1984, corporate respondent and/or George E. Mueller, Sr. shipped 4,860 pounds of 50/50 beef trim to Swift Independent Packing Company, Orlando, Florida, for \$1,980.00. Such beef trim had been stored in the Tampa Cold Storage Company, Tampa, Florida. The proceeds from said sale were deposited in The Bank of Pasco County by George E. Mueller, Sr. on January 24, 1984, and were distributed by corporate respondent and/or George E. Mueller, Sr. to Sam Cohen, United Telephone and M&M Cattle. The M&M Cattle Company is wholly owned by George E. Mueller, Sr. The payments constitute dissipations of trust assets. (CX-9, pp. 17, 37; Tr. pp. 92, 133)

(b) On January 19 & 25, 1984, corporate respondent and/or George E. Mueller, Sr. shipped a total of 9,000 pounds of 50/50 beef trim to Swift Independent Packing Company, Orlando, Florida, for \$3,960.00. Such beef trim had been stored in the Tampa Cold Storage Company, Tampa, Florida. The proceeds from said sale were deposited in The Bank of Pasco County by George E. Mueller, Sr. on February 28, 1984. Such proceeds from said sale were used to make payments to U.S. Leasing, United Telephone, Sumter Electric, and Grafton and Sons, Inc., to make two loan payments totaling \$417.75, and obtain \$1,290.66 in currency, the disposition of which is unaccounted for. The loan payments were made on loans the Bank had made to M&M Cattle, a company wholly owned by

George E. Mueller, Sr. The payments constitute dissipations of trust assets. (CX-9, pp. 29-32, 37; Tr. pp. 89, 133)

11. The corporate respondent and/or George E. Mueller, Sr. failed to hold in trust inventories of livestock which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that, during the period October 24, 1983, through December 12, 1983, corporate respondent and/or George E. Mueller, Sr. purchased a total of 67 head of livestock from Jacksonville Livestock Auction Company, Inc., Whitehouse, Florida, and North Florida Farmers Livestock Market, Inc., Lake City, Florida for \$7,847.56. The corporate respondent's records contain no indication of the slaughter or other disposal or disposition of this livestock. Linda Ledford, bookkeeper for corporate respondent, advised that George E. Mueller, Sr. gave her the invoices for these purchases and told her to pay them from corporate respondent's funds. She paid all except those that are still in accounts payable. (CX-10, pp. 1, 5)

DISCUSSION AND CONCLUSIONS

The basic question here is whether Respondent Jay Mueller, listed as President of corporate respondent during the period of the alleged violations should be held accountable for actions taken by his father, Respondent George E. Mueller, Sr., while Respondent Jay Mueller was divorced from the day to day operations of the corporate respondent. I find that he should not, and dismiss the Complaint.

The corporate respondent was a small family owned business with Respondent Jay Mueller as its President, his father George E. Mueller, Sr. as its Vice-President, and Arthaleen Mueller, mother/wife, as its Secretary/Treasurer. The record here shows that in April, 1983, while Respondent Jay Mueller was actually in charge of the day to day operations of the corporate respondent, an audit conducted by P&S personnel showed that the corporate respondent was experiencing a high percentage of slow payment to sellers of livestock. The corporate respondent had also issued several NSF checks. At that time Respondent Jay Mueller was having difficulty controlling the actions of his father, George E. Mueller, Sr., with regard to the day to day operations of the corporate respondent. P&S personnel explained the provisions and requirements of the Act regarding slow payment to Respondent Jay Mueller, but found the trust assets to be more than enough to cover obligations of the corporate respondent. Respondent Jay Mueller made good the NSF checks and obtained extension credit agreements with its sellers of

livestock. As a result of this compliance, no action was deemed necessary by P&S. (Tr. pp. 119-125)

Complainant does not dispute the facts showing that during the period on or about August 22, 1983, through on or about January 24, 1984, Respondent Jay Mueller completely divorced himself from the day to day management of the corporate respondent. This was due to a serious irreversible business altercation between father and son which prevented Respondent Jay Mueller from again participating in the actual day to day operations of the company, except on a few occasions during this period on which he did purchase cattle at one market on behalf of his father. However, even on these occasions he was a mere conduit since the purchases had to have the authorization of George E. Mueller, Sr., as well as his personal commitment to be responsible for payment of such livestock purchases. Without this authorization and commitment by George E. Mueller, Sr., the cattle could not have been purchased. I find the testimony of Respondent Jay Mueller to be sincere, creditable and worthy of great weight in this matter.

Complainant also admits that during the period Respondent Jay Mueller relinquished the management of the corporate respondent to his father, and that almost all of the alleged violations committed during this period were perpetrated by Respondent George E. Mueller, Sr. Indeed, complainant concedes the evidence shows that Respondent George E. Mueller, Sr. ". . . was the active culprit in the alleged violations, not Respondent Jay Mueller." (Complainant's Brief, pp. 6-7) Such admission is not difficult to concede since, as noted earlier, during the period of Jay Mueller's absence his father was responsible for issuing NSF checks (Finding No. 9), was responsible for ordering payment of non-valid invoices from corporate funds (Finding No. 11), expended funds, properly assignable to the trust fund, to pay utility bills and notes owed to The Pasco County Bank by his wholly owned M&M Company and the improper withdrawal of beef from the trust assets. (Finding No. 10) It is noted here also that Respondent George E. Mueller, Sr., exerting his authority over the company, placed the company in bankruptcy by filing a "Debtors Petition" with the Bankruptcy Court, Tampa, Florida on January 3, 1984.

Further buttressing the facts that Respondent George E. Mueller, Sr. was in complete charge of the day to day operations of corporate respondent is the fact that P&S personnel acknowledged this when they attempted to contact him as a result of learning of unpaid bills to sellers and the corporate respondent's filing bankruptcy. Only when they were unable to contact Respondent George E. Mueller, Sr. did they contact Respondent Jay Mueller at his

home in Lakeland, Florida. There is dispute as to whether knowledge of the provisions of, and responsibilities under the Act, were relayed by Respondent Jay Mueller to his father as a result of the P&S telephone call to him on January 5, 1984. Whether he did or not, I infer from the fact that the P&S letter of January 4, 1984, received at the respondent company on January 11, 1984, that Respondent George E. Mueller, Sr. had knowledge of the provisions of the Act as well as his responsibilities as a packer.

Finally, there is witness testimony that there had been no problems with corporate respondent until Respondent Jay Mueller left. (CX-2, p. 4; Tr. 69-70) When Respondent Jay Mueller did return, he did so in an attempt to make the corporate respondent a viable business with a saleable value. To this end, he injected his own borrowed money into the business in order to keep the plant open. (Tr. pp. 141-142) Additionally, a trust account was opened at The Bank of Pasco County in January 1984. Although the exact date is not discernable from the "New Account Deposit" slip, it appears that this account was opened with checks from payments made to corporate respondent by Baker Hides (\$160.84) and Sun Market (\$384.00) (CX-8, p. 1, lines 3 & 4) which were deposited in the trust account on January 19, 1984. (CX-8, p. 1, line 1) Thus, in correlating the two items the trust account was opened on January 19, 1984, after Respondent George E. Mueller, Sr. had placed the company in bankruptcy and after Respondent Jay Mueller was reminded by P&S personnel of his obligations and responsibilities under the Act.

Deposits made after Respondent Jay Mueller returned were placed in the trust fund account and reflected no impropriety on the part of Respondent Jay Mueller. (CX-8; Tr. 54 & 79) An amount that was not placed in the trust account fund was a check received by the corporate respondent in the amount of \$1,991.89. (CX-5, pp. 1, 4) However, this money was used by Respondent Jay Mueller to pay an electrical bill so that trust fund asset meats in the plant freezer would be protected. As stated by a P&S witness, Respondent Jay Mueller had a duty to protect trust fund assets, and money assignable to the trust fund account could be used to protect such assets. There was no impropriety on the part of Respondent Jay Mueller. (Tr. pp. 73-75)

Thus, during the periods before and after the alleged violations, when Respondent Jay Mueller managed the day to day operations of the corporate respondent, he acknowledged his responsibilities and obligations as a packer under the Act, and performed them in accordance with the regulations. As noted previously, complainant conceded that Respondent George E. Mueller, Sr. ". . . was the active culprit in the alleged violations, not Respondent Jay

[This decision and order became final November 19, 1986.—Ed.]

In re: BOBBY WILLIAMSON. P&S Docket No. 6761. Decided November 20, 1986.

Civil Penalty—Consent.

Respondents consented to the issuance of this decision in which they were assessed a civil penalty of \$350 and were ordered to cease and desist from engaging in business without maintaining adequate bond as required by the Act and the regulations thereunder. Respondents are further suspended as registrants until fully compliant with the bonding requirements.

Peter Train, for complainant.
Respondents, pro se.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby Williamson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 6, Box 243, Opelousas, Louisiana 70570.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bobby Williamson, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Hundred Fifty and no/100 (\$350.00) Dollars.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ELMO MAYES. P&S Docket No. 6591. Decided November 24, 1986.

Civil Penalty.

The Judicial Officer affirmed Chief Judge Campbell's default order assessing an \$8,000 civil penalty and ordering respondent to cease and desist from failing to pay, when due, the full purchase price of livestock. Since respondent failed to file an answer to the complaint, the default decision was properly issued.

Roberta Swartzendruber, for complainant.

Edward M. Dooley, Middlesboro, Kentucky, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et*

seq.).¹ An initial default Decision and Order was filed on May 7, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) assessing an \$8,000 civil penalty and ordering respondent to cease and desist from failing to pay, when due, the full purchase price of livestock.

On October 28, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² The case was referred to the Judicial Officer for decision on November 21, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of respondent's appeal, and specific provisions are added as to the manner in which the civil penalty shall be paid. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

¹ See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, *Agricultural Law*, ch. 71 (1980).

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Elmo Mayes, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Highway 63, Cumberland Gap, Tennessee 37724.

(b) Respondent is and at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(2) A dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

2. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer "shall constitute an admission of all the material allegations of this complaint" (Complaint at 3).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and four copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation. Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,³ respondent has shown no basis for setting aside the default decision here.⁴

³ *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1988) (remand order), *final decision*, 42 Agric. Dec. 1173 (1988) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24, (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁴ See *In re Piezko*, 45 Agric. Dec. ____ (Nov. 12, 1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. ____ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (de-

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their

fault order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal denied*, No. 91 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay \$54,000 civil penalty when waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

On December 9, 1985, complainant's "Motion for Adoption of Proposed Decision" and "Proposed Decision" was filed and sent to respondent on December 12, 1985 by certified mail. (See Exhibit No. 2) Respondent refused to accept the certified mailed documents and they were returned to the Hearing Clerk's Office on December 23, 1985. (See Exhibit No. 2A) Pursuant to Rule of Practice 1.147(b) the "Motion for Adoption of Proposed Decision" and "Proposed Decision" were then sent by regular mail to respondent. (See Exhibit No. 2B) These documents were not returned and no objections to the "Proposed Decision" pursuant to Rule of Practice 1.139 were ever entered by the respondent.

On May 7, 1986, the "Decision and Order Upon Admission of Facts By Reason of Default" was entered against the respondent. The Default Decision was sent to respondent by certified mail on May 9, 1986. (See Exhibit No. 3) It was returned "unclaimed". (See Exhibit No. 3A) Request was made by the Hearing Clerk's Office for personal service of the "Decision and Order Upon Admission of Facts By Reason of Default" against respondent Mayes on June 2, 1986. (See Exhibit No. 3B)

After attempting for several months to locate respondent Mayes, Robert Grainger, Supervisory Scales and Weighing Specialist of the Packers and Stockyards Administration's Bedford, Virginia, regional office and Hal Crocker of the same office located respondent Mayes in his livestock barn on September 9, 1986, at 8:15 a.m. and made personal service on him of a certified copy of the "Decision and Order Upon Admission of Facts By Reason of Default", as well as a copy of the Packers and Stockyards Act and a copy of the regulations promulgated thereunder. (See Exhibits No. 4 and 4A) Thus, respondent's appeal on the basis of due process is false to the point of being frivolously advanced.

By failing to file an answer to the complaint within the time prescribed in section 1.139 of the Rules of Practice, the respondent has admitted all alleged material facts set forth in the complaint. Such admission on the respondent's part negates any requirement that complainant present evidence to prove the violations. Further, denials on the merits offered by the respondent are also negated by re-

spondent's own admissions in failing to answer the complaint within the allocated time.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Elmo Mayes, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Elmo Mayes is assessed a civil penalty in the amount of \$8,000, which shall be paid within 90 days after service of this order. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Roberta Swartzendruber, Office of the General Counsel, U.S. Department of Agriculture, Room 2438, South Building, Washington, D.C. 20250-1400.

In re: RICHARD BALDWIN. P&S Docket No. 6635. Decided October 7, 1986.

Dealer—Market agency—Bonding requirement—Suspended as a registrant—Civil penalty.

Andrew Y. Stanton, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the

Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Richard Baldwin, hereinafter referred to as the respondent, is an individual whose mailing address is 2209 Caldwell Boulevard, Nampa, Idaho 83651.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for his own account and for the accounts of others; and

(2) Registered, along with Myrtle A. Baldwin doing business under the trade name of Y-L Cattle Company, with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account and as a market agency to buy livestock in commerce on a commission basis. This registration has been inactive since September 6, 1984.

2. The Packers and Stockyards Administration notified respondent on May 25, 1983, that the \$35,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated effective June 16, 1983, and that it was necessary to file a bond or bond equivalent in the amount of \$35,000.00 before continuing his operations. Respondent was further notified that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.19 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and for the accounts of others, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 312(a) of the Act (7 U.S.C. § 213(a), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Richard Baldwin, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Seven Hundred and Fifty Dollars (\$1,750.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This default decision and order became final November 24, 1986.—Ed.]

In re: STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, CURTIS HENRY HUBBERT, and TOMMY SMITH d/b/a MAGNOLIA CATTLE CO. P&S Docket No. 6682. Decided November 24, 1986.

Civil Penalty—Consent.

Respondents, Stockyards Dairy Sale, Inc., Stockyards Beef Sale, Inc., Stockyards, Inc., Samuel E. Hubbert, and Curtis Henry Hubbert, consented to the issuance of this decision in which they were assessed a civil penalty of \$12,000.

Ben E. Bruner, for complainant.

H.R. Goodman, Tupelo, Mississippi, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, AND CURTIS HENRY HUBBERT

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

ment of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Stockyards Dairy Sale, Inc., hereinafter referred to as respondent Stockyards Dairy, is a corporation organized and existing under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards Dairy is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Tupelo Stockyard, Inc., hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. (a) Respondent Stockyards Beef Sale, Inc., hereinafter referred to as respondent Stockyards Beef, is a corporation organized and existing under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards Beef is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Tupelo Stockyard Inc.;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. (a) Stockyards, Inc., is a corporation organized under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards, Inc., is, and at all times material herein was the owner of the Tupelo Stockyard, Inc.

4. (a) Samuel E. Hubbert, hereinafter referred to as respondent Sam Hubbert, is an individual whose business mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Sam Hubbert is, and at all times material herein was:

(1) A stockholder in and president of respondent Stockyards Dairy;

(2) The owner of 50% of the outstanding stock issued by respondent Stockyards, Inc.; and

(c) A director of respondent Stockyards, Inc.

5. (a) Curtis Henry Hubbert hereinafter referred to as respondent Henry Hubbert, is an individual whose business mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Henry Hubbert is, and at all times material herein was:

(1) A stockholder in and president of respondent Stockyards Beef;

(2) The owner of 50% of the outstanding stock issued by respondent Stockyards, Inc.;

(3) A director of respondent Stockyards, Inc.; and

(4) Registered with the Secretary as dealer, buying and selling livestock in commerce for his own account, and as a market agency buying livestock in commerce on a commission basis.

6. (a) Respondents Sam Hubbert and Henry Hubbert, acting in combination with each other, and through respondent Stockyards, Inc., are:

(1) Responsible for the direction, management and control of respondents Stockyards Beef and Stockyards Dairy; and

(2) Engaged in the business of selling livestock in commerce on a commission basis.

(b) Respondents Sam Hubbert, Henry Hubbert and Stockyards, Inc., are a market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Stockyards Dairy Sale, Inc., Stockyards Beef Sale, Inc., Stockyards, Inc., Samuel E. Hubbert, and Curtis Henry Hub-

bert, their agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds", within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Withdrawing funds from their "Custodial Account for Shippers' Proceeds" as consideration for sales on a dealer basis and allowing the buyers to reimburse the market at a later date;

4. Issuing checks drawn on their "Custodial Account for Shippers' Proceeds" for the purpose of extending loans and not for the purpose of paying the net proceeds to the owners, consignors or shippers of livestock or the payment of the amounts due the respondents for lawful marketing charges;

5. Purchasing livestock consigned to any market agency in which they have an ownership interest, or are officers or employees, for resale for their own speculative account;

6. Permitting owners, officers, agents or employees to buy out of consignment for resale for their own speculative account;

7. Issuing accounts of sale which fail to show the correct name of the buyer, when the purchaser is the market agency, an owner, officer, agent or employee of the market agency, or a firm in which one of the respondents has an ownership or financial interest; and

8. Failing to charge each consignor the pass-out and no sale charge as part of the tariff as filed with the Secretary of Agriculture.

Respondent Henry Hubbert, his agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to his principals or to other purchasers of livestock from respondent the actual purchase weights of livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other documents showing false, inaccurate or misleading weight entries for such livestock; and

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate or misleading accounts of purchase, invoices or billings.

Respondent Henry Hubbert shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true

nature of all transactions involved in their business subject to the Packers and Stockyards Act, including:

1. Accounts of sale issued to consignors of livestock which show, among other necessary information, the correct name of the consignors and, when the buyer is the market agency, an owner, officer, agent or employee of the market agency, or a person or firm in which one of the respondents has a financial or ownership interest, the correct name of the buyer and relationship with the market agency;
2. Invoices issued to buyers which show the correct name of the buyer and, if the seller or consignor is shown, the correct name of the seller or consignor;
3. Receiving tickets which show the correct names of the consignors and identification of the livestock consigned;
4. Invoices on livestock purchased by the respondent which show the correct name of the buyer;
5. A general ledger containing accounts showing assets, liabilities, income, expenses and net worth or capital;
6. An accurate record of livestock purchased and sold on a dealer basis showing source of purchase and to whom sold; and
7. Copies of all health inspection certificates or releases issued in connection with the sale or shipment of livestock.

Respondents Stockyards Dairy, Stockyards Beef and Curtis Henry Hubbert are each suspended as registrants under the Act for a period of 30 days.

Respondents Samuel E. Hubbert and Stockyards, Inc., are each prohibited from operating subject to the Act for a period of 30 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Stockyards Dairy, Stockyards Beef, Curtis Henry Hubbert, Samuel E. Hubbert, and Stockyards, Inc., are jointly and severally assessed a civil penalty of twelve thousand dollars (\$12,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: ARTHUR A. DARINGER. P&S Docket No. 6767. Decided November 26, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$2000 and ordered to cease and desist from engaging in business

without maintaining adequate bond; issuing checks in payment without maintaining sufficient funds; and failing to pay for purchases when due.

Roberta Swartzendruber, for complainant
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Arthur A. Daringer, hereinafter referred to as the respondent, is an individual whose principal place of business is located in Gordon, Nebraska, and whose business mailing address is Box 246, Gordon, Nebraska 69343.

2. Respondent, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account trading as Gordon Feeder Cattle.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Daringer, his agents and employees, directly or through any corporate or other device, in connection with his busi-

ness operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act and regulations without having and maintaining an adequate bond or its equivalent, as required by the Act and regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock;

4. Failing to pay the full purchase price of livestock; and

5. Failing to properly provide all information required on scale tickets issued to livestock purchasers and sellers as specified in 201.49 of the regulations.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Act, including (1) a general ledger; (2) a complete record of cash receipts and cash disbursements; and (3) complete monthly reconciliations of his dealer bank account.

Respondent Daringer is suspended as a registrant under the Act for a period of 28 days and thereafter until he demonstrates that he is in full compliance with the bonding requirements of the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 28 day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: COY VON WOMACK. P&S Docket No. 6726. Decided November 28, 1986.

Market Agency—Engaging in business while insolvent—Failure to maintain adequate bond—Failure to pay when due—Consent.

Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business without maintaining adequate bond; is

suings payments without having sufficient funds; and failing to pay for purchases when due. Respondent was further suspended as a registrant for a period of five (5) years.

Roberta Swartzendruber, for complainant.

Gary Vinson, Batesville, Arizona, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the Act that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Coy Von Womack, hereinafter referred to as the respondent, is an individual whose principal place of business was located in Heber Springs, Arkansas. Respondent's mailing address is Route 2, Box 143, Grand Saline, Texas 75140.

2. Respondent, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Coy Von Womack, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of one year upon demonstration by respondent that all unpaid livestock sellers have been paid in full, that he is no longer insolvent, and that he is in full compliance with the bonding requirements under the Act and the regulations, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the one year period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILLOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 4, 1986.

Civil Penalty—Consent.

Respondent, Tommy Bond, consented to the issuance of this decision in which he was assessed a civil penalty of \$2000.

Thomas Heinz, for complainant
James K. Dukes, Hattiesburg, Mississippi, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO TOMMY BOND

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Tommy Bond admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Tommy Bond, hereinafter "respondent Bond," is an individual with a mailing address at Rt. 2, Box 455B, Purvis, Mississippi 39475 and who is, and at all times material herein was, engaged in the business of buying and selling livestock in commerce for his own account.

CONCLUSIONS

Respondent Bond having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bond, while employed as a livestock auctioneer or while performing duties of comparable responsibility in connection with the actual conduct of livestock action sales, shall cease and desist from purchasing livestock out of consignment for his own account directly, or indirectly, for speculative resale or to fill orders on an agency basis.

Respondent Bond is prohibited from engaging in business subject to the Act for a period of 14 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 203(b)), respondent Bond is assessed a civil penalty of \$2,000.00.

The provisions of this Order shall become effective on the sixth day after service of this Order on respondent.

Copies of this decision shall be served on the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 4, 1986.

Market Agency—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Suspended as Registrants—Civil Penalty—Consent.

Respondents, Thurman Guilott and Joe Mack Smith, consented to the issuance of this decision in which they were suspended as registrants under the Act and ordered to cease and desist from failing to deposit in and maintain a Custodial Account for Shippers' Proceeds; permitting auction employees to purchase consigned livestock for their own accounts; selling consigned livestock to persons with whom the respondents have an ownership or financial interest; and issuing scale tickets for livestock without completing the necessary information. Respondent Smith is further assessed a civil penalty of \$3000.

Thomas Heinz, for complainant.

James K. Dukes, Hattiesburg, Mississippi, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO THURMAN GUILOTT AND JOE
MACK SMITH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Thurman Guilott and Joe Mack Smith admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation with a mailing address at P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville is, and at all times material herein was:

(1) Engaged in the business of selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

2. Thurman Guillott, hereinafter "respondent Guillott," is an individual who at all times material herein was:

(1) President and an owner of respondent Poplarville; and

(2) A manager, director and controller of the activities of respondent Poplarville.

3. Joe Mack Smith, hereinafter "respondent Smith," is an individual who all times material herein was:

(1) Vice president of respondent Poplarville; and

(2) A manager, director and controller of the activities of respondent Poplarville.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the complainant having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Guillott and respondent Smith, their agents or employees, directly or indirectly through any corporate or other device, in connection with any livestock auction market which they own, manage, direct, or control, shall cease and desist from:

1. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to maintain any "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Permitting auctioneers, weighmasters and other employees engaged in the actual conduct of auction sales to purchase consigned livestock for their own accounts for speculative resale or for the accounts of others;

4. Selling consigned livestock to any owner, officer, agent, employee, or any person in whose business respondent Guillott or re-

spondent Smith has an ownership or financial interest without disclosing the name of the buyer and the nature of the business relationship existing between respondent Guilott or respondent Smith and the buyer; and

5. Issuing scale tickets for livestock sold on a weight basis which do not contain all the information prescribed by section 201.49 of the regulations. (9 CFR § 201.49).

Respondent Guilott is suspended as a registrant under the Act for a period of one year.

Respondent Smith is suspended as a registrant under the Act for a period of 28 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Smith is assessed a civil penalty of \$3,000.00.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GEORGE COUNTY STOCKYARD, INC., and M.H. PITTS. P&S Docket No. 6659. Decided December 4, 1986.

Civil Penalty.

The Judicial Officer affirmed Judge McGrail's order suspending respondent George County Stockyard, Inc., as a registrant for 28 days, prohibiting respondent M. H. Pitts from engaging in business subject to the Act for 28 days, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; and engaging in business without maintaining a reasonable bond or its equivalent, as required. Respondents are jointly and severally assessed a \$4,000 civil penalty, and are required to keep complete and accurate records. Custodial account violations, failing to maintain the proper bond or bond equivalent, failing to pay, when due, the full purchase price of livestock, and failing to maintain accurate records have long been recognized as serious violations of the Act.

Edward Silverstein, for complainant.

Gerald A. Dickerson, Lucedale, Mississippi, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on September 30,

* See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, *Agricultural Law*, ch. 71 (1980).

1986, by Administrative Law Judge Edward H. McGrail (ALJ) suspending respondent George County Stockyard, Inc., as a registrant for 28 days, prohibiting respondent M. H. Pitts from engaging in business subject to the Act for 28 days, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; and engaging in business without maintaining a reasonable bond or its equivalent, as required. Respondents are jointly and severally assessed a \$4,000 civil penalty, and are required to keep complete and accurate records.

On November 5, 1986, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On November 28, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with a few changes too minor to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented ("Act"), 7 U.S.C. § 181 *et seq.*, the regulations issued pursuant to the Act, 9 CFR § 201.1 *et seq.*, and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary, 7 CFR § 1.130 *et seq.* ("Rules of Practice").

The proceeding was instituted by a complaint filed on January 8, 1986, by the Administrator, Packers and Stockyards Administration. It was alleged in the complaint that the George County Stockyard, Inc., and M. H. Pitts violated the Act and the regulations in the following ways: (1) the corporate respondent, under Pitts' direction, management and control, engaged in the business of a dealer buying and selling livestock in commerce for its own account and

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

as a market agency selling livestock in commerce for the accounts of others without maintaining adequate bond coverage (7 U.S.C. §§ 204, 213(a); 9 CFR §§ 201.29, 201.30); (2) the respondent corporation, under the direction, management and control of respondent Pitts, failed to properly maintain and use its "Custodial Account for Shippers' Proceeds," thereby endangering the faithful and prompt accounting thereof, and payment of the portions thereof, due the owners and consignors of livestock (7 U.S.C. §§ 208, 213(a); 9 CFR §201.42); (3) George County Stockyards, Inc., under Mr. Pitts' direction, management and control, purchased livestock and failed to pay, when due, the full purchase prices of such livestock (7 U.S.C. §§ 213(a), 228b); and (4) respondents failed to keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in their business as a market agency and dealer under the Act and, in particular, failed to keep and maintain a separate ledger showing their purchases and sales in support of the market (7 U.S.C. § 221, 9 CFR § 201.49).

On February 18, 1986, respondents filed an Answer in which they alleged that they satisfied all the Act's bonding requirements, that the complainant failed to consider the existence of \$59,637.48 in certificates of deposit in concluding that they failed to properly maintain the corporate respondent's custodial account, and generally denied all of the allegations in the Complaint, except with regard to paragraph I of the Complaint, in which the complainant identified respondents and alleged all of the jurisdictional prerequisite to the bringing of an action against them under the Act, which they admitted.

At the oral hearing, held on June 18, 1986, in Mobile, Alabama, and without objection, complainant's motion to correct arithmetical errors in paragraph III of the Complaint was granted. (Tr. 8-10, 40) ¹ Complainant was represented by Edward M. Silverstein, Esq., Packers and Stockyards Division, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented by Gerald A. Dickerson, Esq., 202 Cox-Courthouse Square, Lucedale, Mississippi 39452. Leave was granted to the parties to file briefs, complainant on or before August 1, 1986, respondents by September 1, 1986, and complainant's reply by September 19, 1986. Such briefs have been filed and duly considered. For convenience, the pertinent statutory and regulatory provisions are set forth in Appendices A and B.

¹ Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

FINDINGS OF FACT

1. George County Stockyard, Inc., ("George County") is a Mississippi corporation with its principal place of business at Lucedale, Mississippi, whose business mailing address is P.O. Box 105, Lucedale, Mississippi 39452. (Complaint Para. I(a); Answer Para. I; CX-1; Tr. 15-18)

2. At all material times, George County was:

(a) Engaged in the business of conducting and operating the George County Stockyard, Inc., a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce. (Complaint Para. I(b); Answer Para. I; CX-1, Tr. 15-18)

3. M. H. Pitts ("Pitts") is an individual whose mailing address is P.O. Box 105, Lucedale, Mississippi 39452. (Complaint Para. I(c); Answer Para. I; CX-1, Tr. 15-18)

4. At all material times, Pitts was:

(a) President of George County;

(b) Owner of George County;

(c) Responsible for the direction, management and control of George County; and

(d) A market agency and dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act. (Complaint Para. I(d); Answer Para. I; CX-1, Tr. 15-18, 139)

5. By letter, dated July 9, 1985, the Packers and Stockyards Administration (P&S) notified George County that the \$10,000.00 surety bond it maintained to secure the performance of its livestock dealer obligations under the Act was inadequate, and that it was necessary to increase such bond to \$20,000.00. By letter, dated August 20, 1985, P&S notified George County it had failed to file a new bond increasing bond coverage to \$20,000.00 and that punitive action would be taken if the new bond was not filed.

On November 12, 1985, P&S notified George County that the \$10,000.00 surety bond it maintained to secure the performance of its livestock dealer obligations under the Act and the \$60,000.00 surety bond it maintained to secure the performance of its obligations under the Act as a market agency selling livestock for the accounts of others would terminate on December 12, 1985. George County was further notified that, if it continued its livestock oper-

ations without adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, George County, under Pitts' direction, management and control, continued to engage in the business of a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce for the accounts of others, without maintaining adequate bond coverage or its equivalent as required by the Act and the regulations. This unlawful operation continued until January 10, 1986, when an acceptable bond was posted. (CX-2, 3; Tr. 18-25)

6. George County, under Pitts' direction, management and control, during the period April 30, 1985, through at least May 17, 1985, failed to properly maintain and use its "Custodial Accounts for Shippers' Proceeds," hereinafter referred to as the custodial account, thereby endangering the faithful and prompt accounting thereof, and payment of the portions thereof, due the owners and consignors of livestock in that:

(a) As of April 30, 1985, George County had outstanding checks drawn on its custodial account in the amount of \$104,983.92 and had, to offset such checks, an overdraft in its custodial account in the amount of \$85.06, no deposits in transit, and proceeds receivable in the amount of \$89,700.59, resulting in a deficiency of \$15,368.39 in funds available to pay shippers' proceeds;

(b) As of May 17, 1985, George County had outstanding checks drawn on its custodial account in the amount of \$197,200.06 and had, to offset such checks, cash in its custodial account in the amount of \$5,261.38, no deposits in transit and proceeds receivable in the amount of \$148,021.14, resulting in a deficiency of \$43,917.54 in funds available to pay shippers' proceeds;

(c) The shortages described above were caused, in part, by: (1) the deposit of funds to George County's expense account received from the sale of consigned livestock; and (2) the respondents' failure to deposit to the custodial account, within the time proscribed by the regulations, amounts equal to the proceeds receivable due from the owners, officers and employees of the market agency. (CX-7, 8, 10; Tr. 36-52, 55-61)

7. All persons who have custodial accounts under the Act, and the banks handling such accounts, within the Memphis, Tennessee, Region of the Packers and Stockyards Administration (the States of Tennessee, Mississippi, Louisiana and Arkansas) were made aware of the requirements of the Department with regard to the handling of the funds in such accounts. The custodial account is a trust account for the consignors of livestock. The auction markets are

trustees of these accounts and their obligation is to promptly reimburse the account to provide funds for payment of livestock. All monies collected from the buyers of livestock should be placed directly into this account. It is a conduit through which the buyer of livestock pays the seller. To be considered part of the custodial account, securities must be dedicated to, and in the name of, the custodial account. In such status, funds are protected for each consignor and each is insured by the Federal Deposit Insurance Corporation. Whereas assignment of securities to the custodial account does not protect the consignor since such are subject to attachment. (CX-13; Tr. 42-43, 106, 114-117, 127)

8. George County, under Pitts' direction, management and control, in connection with their operations as a dealer, on or about the dates and in the transactions specified below and in various other transactions, purchased livestock and failed to pay, when due, the full purchase price of such livestock: (CX-6, 11; Tr. 34-36, 61-64)

DATE OF PURCHASE	NAME OF SELLER	AMOUNT	HEAD
3/06/85	Poplarville Stockyards, Inc.	\$1,482.75	7
3/03/85	Poplarville Stockyards, Inc.	4,095.69	65
3/18/85	Robertsdale Livestock Auction, Inc.	6,201.90	32
3/20/85	Poplarville Stockyards, Inc.	2,092.35	9
3/25/85	Robertsdale Livestock Auction, Inc.	24,075.65	92
4/08/85	Robertsdale Livestock Auction, Inc.	35,044.23	129
4/16/85	Poplarville Stockyards, Inc.	7,654.53	27
4/27/85	Poplarville Stockyards, Inc.	\$22,565.14	100

9. Respondent failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in their business as a market agency and dealer under the Act in that respondents failed to keep and maintain a separate ledger showing their purchases and sales in support of the market. Additionally, respondent failed to keep and maintain complete scale tickets in that (1) scale tickets were not used in numerical sequence; (2) voided scale tickets and those used to balance the scale were discarded; and (3) scale tickets did not show the name or initial of the weighmaster or show the date of the weighing. (CX-12; Tr. 38, 64-68, 76)

10. The improper handling of, and misuse of, funds in a custodial account, shortages in custodial accounts, and failure to pay for pur-

chases of livestock when due, are considered serious violations of the Act. (Tr. 119-120)

11. The payment of a civil penalty in the amount of \$4,000 by respondents would not cause them to cease operating. (Tr. 120-121)

12. There are several other markets within the geographical area served by respondents available to farmers and ranchers for sale of livestock. (Tr. 121, 129-132)

DISCUSSION AND CONCLUSIONS

Failure to Maintain Proper Bond

The Act and the regulations issued pursuant to it require market agencies, packers and dealers to maintain a reasonable bond to secure the performance of their livestock obligations (7 U.S.C. § 204; 9 CFR §§ 201.19, 201.30). The bonding provisions were added as a special protection against future losses to the livestock producer (see H. Rep. No. 94-1043, 94th Cong., 2d Sess., p. 5; Sen. Rep. No. 94-932, 94th Cong., 2d Sess., pp. 5-6). Thus, such bonding provisions are considered vital to the effective enforcement of the Packers and Stockyards Act and for the protection of livestock producers.

The record is clear that respondents were notified by P&S letters commencing on July 9, 1985, and again on August 20, 1985, that it would be necessary to increase bond requirements. The latter letter also noted a warning of suspension of registration under the Act if the increased bond requirement was not filed. Additionally, respondents were notified by P&S letter of November 12, 1985, that its surety bond with the Aetna Casualty and Surety Company would terminate on December 12, 1985, and that operation without filing an adequate bond would be in violation of the Act and the regulations. Such notices were admitted to have been received by respondents. However, an acceptable bond was not filed until January 10, 1986. Thus, from the date of receipt of the July 9, 1985, P&S letter until an acceptable bond was filed on January 10, 1986, George County, under the direction, management and control of respondent Pitts, continued to operate as a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce for the accounts of others, without maintaining adequate bond coverage.

Such is a willful violation of the Act (7 U.S.C. § 204) and the regulations (9 CFR §§ 201.19, 201.30) issued pursuant to it. *In re Donald Hageman*, 43 A.D. 531 (1983); *In re Molnar Packing Company*, 41 A.D. 935 (1982); *In re C. J. Edzards*, 37 A.D. 1880 (1978). The circumstances portraying respondents' efforts to obtain adequate bonding do not mitigate this violation.

Failure to Properly Maintain and Use Custodial Account

It has long and consistently been held by the Secretary, and the courts, that the improper handling and use of the shippers' proceeds violate the integrity of the Custodial Account for Shippers' Proceeds and the regulations promulgated to preserve it. Improper handling and use of the custodial account is plainly contrary to the Act and the regulations. *In re Farmers and Ranchers Livestock Auction, Inc.*, 45 A.D. ____ (February 1986); *In re Arab Stock Yard, Inc.*, 37 A.D. 293 (1978) *aff'd*, 582 F.2d 39 (5th Cir. 1978); *W. I. Bowman v. U.S. Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966). Further, in *In re Harry C. Daniels d/b/a Harry C. Daniels and Co. v. United States*, 242 F.2d 39, 41-42 (7th Cir., 1957), *cert. denied*, 354 U.S. 939, the court held:

"The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required" (citations omitted).

Although respondents were previously warned by P&S letter of February 25, 1977, of abuse of the custodial account, and advised in P&S letter of January 16, 1985, of the required method of designating the custodial account as a trust account, respondents continued to misuse this account and failed to properly designate it as a trust account. As noted from the record, receipts from sales of consignor's livestock were placed in respondents' expense account, and on two occasions the custodial account was deficient. Further, that these certificates of deposit (CD's) were only assigned to the custodial account as pledged securities, and not titled in the name of the account as required. Additional evidence of record shows that the CD's were not considered by the bank to be part of George County's custodial account. As was previously pointed out, the custodial account is a trust account which is a conduit for funds received for sale of consignor's livestock. When properly designated as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation. It was therefore correct not to include the amount of the CD's in the computation of deficiencies in the custodial account.

Under these circumstances it must be found that respondents violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 CFR § 201.42). See *In re Sechrist Sales Company*, 36 A.D. 665 (1977); *In re L. S. Hansen*, 38 A.D. 223 (1979).

Failure to Pay When Due

Unrebutted evidence from records of respondents clearly show that under the direction and control of respondent Pitts, George County made livestock purchases and failed to pay, when due, the full purchase price for such livestock.

Failure to pay, when due, the full purchase price of livestock is a serious violation of the Act and constitutes an unfair and deceptive practice in willful violation of sections 312(a) and 419 of the Act (7 U.S.C. 213(a), 228b). *In re Farmers and Ranchers Livestock Auction, Inc.*, *supra*; *In re Donald Hageman*, *supra*; *In re W. I. Bowman*, *supra*; *In re Mid-States Livestock, Inc.*, 37 A.D. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

Failure to Properly Keep and Maintain Accounts, Banks and Records

As noted, the Act requires respondents to create, keep and maintain records sufficient to disclose all the details of the business (7 U.S.C. § 221). Complete and accurate records are essential to effective enforcement of the regulatory program. *In re Trenton Livestock, Inc.*, 41 A.D. 1965 (1982); *In re Livestock Marketing Development Co.*, 33 A.D. 784 (1974). The record is clear that respondents failed to keep and maintain a separate ledger showing their purchases and sales in support of the market. Such a ledger is required to be maintained by the Act to show all purchases by the company itself to support the purchase or selling price of livestock. Such record ledger was not maintained. Thus, section 401 of the Act, 7 U.S.C. § 221, has been violated.

As the Act and the regulations reflect, respondents are required to create, keep and maintain scale tickets for livestock transactions (7 U.S.C. § 221; 9 CFR §§ 201.49, 201.55). Respondents' scale tickets were not issued in numerical order, voided scale tickets and those used to balance the scale were discarded, the date of weighing and the name or initials of the weighmaster were not shown. Scale tickets are a basic and important record of livestock transactions and, standing alone failure to keep and maintain such record constitutes a serious violation of the Act. *In re Saylor*, 44 A.D. ____ (September 20, 1985); *In re Elmer A. Kath*, 36 A.D. 1707 (1977).

Sanction

The Secretary has long urged a policy to impose severe sanctions where serious violations, as shown here, have been found even when a significant suspension period may have an adverse economic effect on the violator's customers. *In re Saylor*, *supra*; *In re Esposito*, *supra*.

sito, 38 A.D. 613, 624-625 (1977); *In re Worsley*, 33 A.D. 1547, 1556-1571 (1974).

Complainant here seeks a twenty-eight (28) day suspension of George County's registration, a twenty-eight (28) day prohibition forbidding respondent Pitts from operating or otherwise engaging in business subject to the Act, and a civil penalty of \$4,000 against respondents, jointly and severally. Both the suspensions and civil penalty are consistent with the statutory criteria for imposing civil penalties, 7 U.S.C. § 213(b), and with the Secretary's sanction policies to effectuate the purposes of the regulatory program.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings and conclusions are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.² Respondent's argument on appeal, in this respect, merely reargues matters that were fully considered and correctly decided by the ALJ.

Custodial account violations have long been recognized as serious violations of the Packers and Stockyards Act. In addition to the cases cited by the ALJ, see *Roseth v. Bergland*, 636 F.2d 1224 (8th Cir. 1980); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974); *Hyatt and Ward v. United States*, 276 F.2d 308, 310-13 (10th Cir. 1960); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932). Similarly, failing to maintain the proper bond or bond equivalent and failing to pay, when due, the full purchase price of livestock have long been recognized as serious violations of the Act.

The serious nature of recordkeeping violations was stated in *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand), quoting from *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1734 (1978), as follows:

Respondent's recordkeeping violations, which are intertwined with respondent's accounting violations, are also serious violations of the Act inasmuch as accurate records are essential to effective enforcement of a Federal regulatory program. See, e.g., *United States v. Ruzicka*, 329 U.S. 287, 288-289; *United States v. Darby*, 312 U.S. 100, 124-125;

² See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Electric Bond Co. v. Comm'n., 303 U.S. 419, 439; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 204-216; *Baltimore & Ohio RR. v. Interstate Com.*, 221 U.S. 612, 620-623; *Hyatt v. United States*, 276 F.2d 308, 312 (C.A. 10); *Panno v. United States*, 203 F.2d 504, 510 (C.A. 9); *United States v. Turner Dairy Co.*, 166 F.2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; *United States v. Turner Dairy Co.*, 162 F.2d 425, 425-428 (C.A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co. v. Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1529 (1977).

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498-520 (Sept. 20, 1985) (decision on remand),³ which is set forth as Appendix C to this decision.⁴

³ The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁴ Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 33 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; (1977) *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-60 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpub-

(continued)

Respondents contend that any violations of the Act were not intentional, but as stated by the Court in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973), with respect to the Packers and Stockyards Act:

The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent.

The \$4,000 civil penalty and 28-day suspension imposed here is not nearly as severe as numerous sanctions that have been issued in recent years under the Packers and Stockyards Act, e.g., *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. ____, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985); *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) (\$10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

lished); *In re Miller*, 38 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

In *In re Garver*, *supra*, 45 Agric. Dec. ____ , slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5 year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60 day suspension orders would have been issued in comparable cases a few years ago.

In assessing a civil penalty, the Act requires consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). Those factors were fully considered by the ALJ.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

George County Stockyard, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and M. H. Pitts, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act without filing and maintaining a reasonable bond or its equivalent as required by the Act and the regulations;
2. Failing to deposit in their "Custodial Account for Shippers' proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;
3. Using funds received as proceeds receivable from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;
4. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;
5. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42); and
6. Failing to pay, when due, the full purchase price of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers

and Stockyards Act, including a separate ledger showing their purchases and sales in support of the market and scale tickets which are kept in strict conformity with the provisions of section 201.49 of the regulations (9 CFR § 201.49). Scale tickets shall be used in numerical order and show the date of the weighing and the name or initials of the weighmaster.

George County Stockyard, Inc., is suspended as a registrant under the Act for 28 days and thereafter until (1) it demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated and (2) until such time as it complies fully with the bonding requirements under the Act and regulations. When the corporate respondent demonstrates the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 28-day period.

M. H. Pitts is prohibited for 28 days from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis, or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either for his own account or as the employee or agent of the vendor or purchaser.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), the respondents are jointly and severally assessed a civil penalty in the amount of \$4,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist and recordkeeping provisions of this order shall become effective on the day after service of this order. The 28-day suspension and prohibition provisions shall become effective on the 30th day after service of this order.

APPENDIX A

Pertinent Statutory Provisions

1. § 307 (7 U.S.C. § 208)

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, reasonable, or discrimi-

natory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

2. § 312(a) (7 U.S.C. § 213(a))

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

3. § 401 (7 U.S.C. § 221)

Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both.

4. § 409 (7 U.S.C. § 228(b))

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer

which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis and every dealer buying for his own account or for accounts of others shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

(c) Each market agency and dealer whose buying operations are cleared by another market agency shall be named as clearee in the bond filed and maintained by the market agency registered to provide clearing services. Each market agency selling livestock on a commission basis shall file and maintain its own bond.

(d) Every packer purchasing livestock, directly or through an affiliate or employee or a wholly-owned subsidiary, except those packers whose annual purchases do not exceed \$500,000, shall file and maintain a reasonable bond. In the event a packer maintains a wholly-owned subsidiary or affiliate to conduct its livestock buying, the wholly-owned subsidiary or affiliate shall be registered as a packer buyer for its parent packer firm, and required bond shall be maintained by the parent packer firm.

§ 201.30 Amount of market agency, dealer and packer bonds.

(a) *Market agency selling livestock on commission.* To compute the required amount of bond coverage, divide the dollar value of livestock sold during the preceding business year, or the substantial part of that business year, in which the market agency did business, by the actual number of days on which livestock was sold. The divisor (the number of days on which livestock was sold) shall not exceed 130. The amount of bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$50,000, the amount of bond coverage need not exceed \$50,000, plus 10 percent of the excess over \$50,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage for a market agency selling on commission be less than \$10,000 or such higher amount as required to comply with any State law.

(b) *Market agency buying on commission or dealer.* The amount of bond coverage must be based on the average amount of livestock purchased by the dealer or market agency during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the dealer or market agency or both did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$75,000, the amount of bond coverage need not exceed \$75,000 plus 10 percent of the excess over \$75,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage be less than \$10,000 or such higher amount as required to comply with any State law.

(c) *Market agency acting as clearing agency.* The amount of bond coverage must be based on the average amount of livestock purchased by all persons for whom the market agency served as a clearor during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased by all persons for whom the market agency served as a clearor during the preceding business year, or substantial part of that business year, in which the market agency acting as clearing agency did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$75,000, the amount of bond coverage need not exceed \$75,000 plus 10 percent of the excess over \$75,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage be less than \$10,000 or such higher amount as required to comply with any State law.

(d) *Packer.* The amount of bond coverage must be based on the average amount of livestock purchased by the packer during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the packer did business, by one-half the number of days on which business was conducted. The number

of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of \$5,000 above the amount so determined. In no case shall the amount of bond coverage for a packer be less than \$10,000.

(e) If a person applying for registration as a market agency or dealer has been engaged in the business of handling livestock before the date of the application, the value of the livestock handled, if representative of future operations, must be used in computing the required amount of bond coverage. If the applicant for registration is a successor in business to a registrant formerly subject to these regulations, the amount of bond coverage of the applicant must be at least that amount required of the prior registrant, unless otherwise determined by the Administrator. If a packer becomes subject to those regulations, the value of livestock purchased, if representative of future operations, must be used in computing the required amount of bond coverage. If a packer is a successor in business to a packer formerly subject to these regulations, the amount of bond coverage of the successor must be at least that amount required of the prior packer, unless otherwise determined by the Administrator.

(f) Whenever the Administrator has reason to believe that a bond is inadequate to secure the performance of the obligations of the market agency, dealer or packer covered thereby, the Administrator shall notify such person to adjust the bond to meet the requirements the Administrator determines to be reasonable.

§ 201.42 Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that

have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) the net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of the consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock and live poultry.

(a) *Livestock*. When livestock is weighed for the purpose of purchase or sale, a scale ticket shall be issued which shall show: (1) The name and location of the agency performing the weighing service; (2) the date of the weighing; (3) the name of the buyer and seller or consignor, or a designation by which they may be readily identified; (4) the number of head; (5) kind; (6) actual weight of each draft of livestock; and (7) the name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weigher. Scale tickets issued under this section shall be serially numbered and used in numerical sequence. Sufficient copies shall be executed to provide a copy to all parties to the transaction. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale or other basic record, this record may serve in lieu of a scale ticket. When livestock is purchased on a carcass weight or carcass grade and weight basis, the hot carcass weights shall be accurately recorded, either manually or automatically, and retained as part of the person or firm's business records to substantiate settlement on each transaction.

(b) *Poultry*. When live poultry is weighed for the purpose of purchase, sale, acquisition, or settlement by a packer or live poultry dealer or handler, a scale ticket shall be issued which shall show: (1) The name of the agency performing the weighing service; (2) the name of the packer or live poultry dealer or handler; (3) the name and address of the grower, purchaser, or seller; (4) the name or initials of the person who weighed the poultry, (5) the location of the scale; (6) the gross weight, tare weight, and net weight; (7) the date and time gross weight and tare weight are determined; (8) the number of poultry weighed; (9) the weather conditions; (10) whether the driver was on or off the truck at the time of weighing; and (11) the license number of the truck or the truck number; *Provided*, That when live poultry is weighed on a scale other than a vehicle scale, the scale ticket need not show the information specified in (9), (10), and (11) of this paragraph. Scale tickets issued under this paragraph shall be at least in duplicate form and shall be serially numbered and used in numerical sequence. One copy shall be furnished to the grower, purchaser, or seller, and one copy shall be furnished to or retained by the packer or live poultry dealer or handler.

APPENDIX C

Excerpt from *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498-520 (Sept. 20, 1985) (decision on remand).

U.S.D.A SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: JIMMY D. BRUNNING. P&S Docket No. 6769. Decided December 15, 1986.

Dealer and Market Agency—Failure to pay when due—Failure to maintain adequate bond—Failure to keep and maintain proper accounts, records and memorandum—Consent.

Respondent consented to the issuance of the decision in which they were ordered to cease and desist from engaging in business without filing and maintaining adequate bond; engaging in business while current liabilities exceed current assets; and failing to pay for purchases when due.

Sharlene Lassiter, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture alleging that the respondent's financial condition does not meet the requirement of the Act and that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jimmy D. Bruning, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Superior, Nebraska 68978.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmy Bruning, his successors and assigns, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Engaging in business subject to the Act while his current liabilities exceed his current assets; and

3. Failing to pay, when due, the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Act, including but not limited to (1) periodic bank account reconciliations; (2) a general ledger; (3) buyers invoices; (4) bank statements; (5) deposit tickets; and (6) accounts of sale.

Respondent Jimmy Bruning is suspended as a registrant under the Act for a period of sixty (60) days and thereafter until such time as he is in full compliance with the bonding requirements under the Act and the regulations and demonstrates that he is no longer insolvent. When respondent demonstrates that he is in full compliance with such bonding requirements and that he is solvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the sixty (60) day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

*In re: COURTWRIGHT CATTLE Co., INC. and J.C. COURTWRIGHT. P&S
Docket No. 6774. Decided December 16, 1986.*

Market Agency—Engaging in business while current liabilities exceed current assets—Failure to pay when due—Consent.

Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business while current liabilities exceed current assets; issuing checks for payment without maintaining sufficient funds; and failing to pay for purchases when due.

Ben E. Bruner, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Courtright Cattle Co., Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located in Warden, Washington. The corporate respondent's business mailing address is P. O. Box 398, Road #6 S.E., Warden, Washington 98857.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to purchase livestock in commerce on a commission basis.

3. J. C. Courtright, hereinafter referred to as respondent Courtright, is an individual whose business mailing address is P. O. Box 398, Road #6 S.E., Warden, Washington 98857.

4. Respondent Courtright, at all times material herein, was:
- (a) President of the corporate respondent; and
 - (b) Responsible for the direction, management and control of corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent, its officers, agents, employees, successors and assigns, and respondent Courtright, his agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;
2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;
3. Failing to pay, when due, for livestock purchases; and
4. Failing to pay for livestock purchases.

The respondents are suspended as registrants under the Act for a period of five years and thereafter until their current liabilities no longer exceed their current assets, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension and prohibition at any time after the expiration of 90 days upon demonstration that all unpaid livestock sellers have been paid in full, and that their current liabilities no longer exceed their current assets, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to provide the salaried employment of respondent Courtright by another registrant after the expiration of the 90 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 18, 1986.

Market Agency—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Consent.

Respondent, Poplarville Stockyards, Inc., consented to the issuance of this decision in which they were ordered to cease and desist from failing to deposit in and maintain a Custodial Account of Shippers' Proceeds; permitting auction employees to purchase consigned livestock for their own accounts; selling consigned livestock to persons with whom the respondents have an ownership or financial interest; and issuing scale tickets without completing necessary information.

Thomas Heinz, for complainant.

James K. Dukes, Hattiesburg, Mississippi, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO POPLARVILLE STOCKYARDS, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. Section 181, et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents willfully violated the Act and the regulations issued thereunder (9 CFR Section 201.1 et seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR Section 1.138).

Respondent Poplarville Stockyards, Inc., admits the jurisdictional allegations in paragraph I of the complaint as they pertain to it and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation with a mailing address at P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville is, and at all times material herein was:

(1) Engaged in the business of selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

CONCLUSIONS

Respondent Poplarville Stockyards, Inc., having admitted the jurisdictional facts and the complainant having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Poplarville, its successors, officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by Section 201.42 of the regulations (9 CFR Section 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to maintain any "Custodial Account for Shippers' Proceeds" in conformity with the provisions of Section 201.42 of the regulations (9 CFR Section 201.42);

3. Permitting auctioneers, weighmasters and other employees of the livestock auction market engaged in the actual conduct of auction sales to purchase consigned livestock for their own accounts for speculative resale or for the accounts of others;

4. Selling consigned livestock to any owner, officer, agent, employee, or any person in whose business respondent Poplarville, its owners, officers, agents, or employees have an ownership or financial interest without disclosing the name of the buyer and the nature of the business relationship existing between respondent Poplarville and the buyer;

5. Issuing scale tickets for livestock sold on a weight basis which do not contain all the information prescribed by Section 201.49 of the regulations (9 CFR Section 201.49); and

6. Employing Joe Mack Smith in any capacity for a period of twenty-eight (28) days.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

In re: FORT SCOTT SALE COMPANY, INC., ROBERT E. WALROD and
LEONA P. WALROD. P&S Docket No. 6630. Decided December
19, 1986.

Dealer and Market Agency—Engaging in business while insolvent—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Consent.
Respondents consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business while insolvent and failing to deposit in and maintain a Custodial Account for Shippers' Proceeds.

Roberta Swartzendruber, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act (7 U.S.C. § 204), and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Fort Scott Sale Company, Inc., hereinafter referred to as the corporate respondent, is a Kansas corporation. The corporate respondent's principal place of business is located at Fort Scott, Kansas, and its mailing address is Box 829, Fort Scott, Kansas 66701.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Fort Scott Sale Company, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Robert E. Walrod and Leona P. Walrod, hereinafter referred to as the individual respondents, are individuals whose mailing address is Box 829, Fort Scott, Kansas 66701.

4. The individual respondents are, and at all times material herein were:

(a) President and Vice-President, and Secretary and Treasurer, respectively, of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) A market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Fort Scott Sale Company, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Robert E. Walrod and Leona P. Walrod, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while current liabilities exceed current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the specific times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock whether or not such proceeds have been collected by respondents;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

Corporate respondent Fort Scott Sale Company, Inc., is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until it demonstrates that it is no longer insolvent and that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated. When corporate respondent demonstrates that it is no longer insolvent and that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated, a

supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-eight (28) day period.

Registrant Miami County Sale Company, Inc., at Paola, Kansas, which is owned, directed and controlled by individual respondent Robert E. Walrod, is suspended as a registrant under the Act for a period of twenty-eight (28) days.

Respondents Robert E. Walrod and Leona P. Walrod are prohibited for a period of twenty-eight (28) days from engaging in business or operating subject to the Act as a dealer and/or a market agency selling livestock on a commission basis.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents, provided, however, that the twenty-eight day suspension period herein stated shall commence on January 15, 1987.

Copies of this decision shall be served upon the parties.

In re: CEDAR CREEK LIVESTOCK CO., INC., and HOLLAN A. WILSON, JR. P&S Docket No. 6718. Decided November 4, 1986.

Issuing checks without sufficient funds—Failing to pay when due—Suspended as registrant.

Respondents were ordered to cease and desist from issuing checks for payment without having or maintaining sufficient funds; failing to pay for purchases when due; and failing to pay for livestock purchases. Respondents were further suspended as registrants under the Act for a period of five (5) years.

Decision by Edward H. McGrail, Administrative Law Judge.

**DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Cedar Creek Livestock Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Georgia. Respondent's business mailing address is Route 1, Ware Road, Abbeville, Georgia 31071.

(b) The corporate respondent at all times material herein was:

(1) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to purchase livestock in commerce on a commission basis.

(c) Hollan A. Wilson, Jr., hereinafter referred to as respondent Wilson, is an individual whose business mailing address is Route 1, Ware Road, Abbeville, Georgia 31071.

(d) Respondent Wilson, at all times material herein, was:

(1) President of the corporate respondent; and

(2) Responsible for the direction, management and control of the corporate respondent.

2. (a) The corporate respondent, under the direction, management and control of the individual respondent, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks.

(b) The corporate respondent, under the direction, management and control of respondent Wilson, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph (a) above, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of May 30, 1986, there remained unpaid a total of approximately \$9,480.84 for the livestock purchases set forth in paragraph II of the complaint.

CONCLUSIONS

By reason of the facts found in paragraph II herein, respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Cedar Creek Livestock Co., Inc., its officers, directors, agents and employees, and respondent Hollan A. Wilson, Jr., directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;
2. Failing to pay, when due, for livestock purchases; and
3. Failing to pay for livestock purchases.

The corporate respondent is suspended as a registrant under the Act for a period of five years, and the individual respondent is prohibited from operating subject to the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension and prohibition at any time after the expiration of 60 days upon demonstration that all unpaid livestock sellers have been paid in full; and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent Wilson by another registrant after the expiration of the 60 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final December 12, 1986 for respondent Hollan A. Wilson, Jr., and it became final December 22, 1986 for respondent Cedar Creek Livestock Co., Inc.—Ed.]

In re: VALDA, INC., and G.L. CHERRY. P&S Docket No. 6703. Decided December 31, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$10,000 (\$8,500 of which shall be held in abeyance for a period of five years) and ordered to cease and desist from issuing checks without having and maintaining sufficient funds, and failing to pay for purchases when due.

Peter Train, for complainant.

Leonard B. Gordon, Philadelphia, Pennsylvania, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraphs I and II of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this order.

FINDINGS OF FACT

1. Valda, Inc., doing business as Catelli Meat Packers, hereinafter referred to as the corporate respondent, is a corporation whose business address is 48 Almshouse Road, Richboro, Pennsylvania 18954.

2. The corporate respondent at all times material herein was:

a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

b) A packer within the meaning of and subject to the provisions of the Act.

3. G. L. Cherry, hereinafter referred to as the individual respondent, is an individual whose business address is 48 Almshouse Road, Richboro, Pennsylvania 18954.

4. The individual respondent at all times material herein was:

a) President and General Manager of the corporate respondent;
and

b) Responsible for the direction, management and control of the corporate respondent.

5. Mrs. G. L. Cherry, wife of the individual respondent, owns all the corporate stock issued by the corporate respondent, but is not active in the operations of the firm.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and the individual respondent, individually or as an officer, director, agent or employee of the corporate respondent or its successors, in connection with their operations as a packer subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock;

3. Failing to pay for livestock;

4. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock;

5. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases; and

6. Failing to issue accountings to sellers of livestock on carcass grade, carcass weight, or carcass grade and weight basis which fully and completely disclose the number, weight and price of the carcasses of each grade (identifying the grade) and of any ungraded carcass and any other information affecting final accounting.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Valda, Inc., and G. L. Cherry are jointly and severally assessed a civil penalty in the amount of ten thousand dollars (\$10,000.00), of which \$8,500.00 shall be held in abeyance for a period of 5 years provided, however, that if respondents violate this order in any manner within this period, the full amount of this civil penalty shall immediately become due and payable. It is spe-

cifically acknowledged that such penalty is not intended to constitute an agreed settlement for such future violations, should they occur, and is in addition to whatever penalties and sanctions any future violations would warrant. If respondents do not violate this order for a five year period, the remaining \$8,500.00 segment of the penalty shall be abated and shall no longer be due and payable.

This order shall have the same force and effect as if entered after the full hearing and shall be effective on the first day after service upon respondents.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: RICHARD N. GARVER. P&S Docket No. 6449. Decided November 3, 1986.

Peter Train, for complainant.

Thomas R. Smith, Cincinnati, Ohio, for respondent.

Decision by Donald A. Cambell, Judicial Officer.

STAY ORDER

The attorney for respondent has requested a stay of the order issued herein pending appeal to the United States Court of Appeals for the Sixth Circuit. The suspension order issued herein is hereby stayed pending the outcome of the appeal. The cease and desist provisions of the order shall remain in effect.

In re: SUE VIRTUE. P&S Docket No. 6701. Decided November 7, 1986.

Peter Train, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 16, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until she complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 16, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: WILLIAM and ARLENE MACKERRACHER. P&S Docket No. 6712.
Decided November 13, 1986.

Andrew Stanton, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On August 4, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act until such time as they complied fully with the bonding requirements under the Act and the regulations.

Respondents are now in full compliance with the bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 4, 1986, is terminated. The order shall remain in full force and effect in all other respects.

REPARATIONS DECISIONS

RAYMOND C. ANDREWS, M.D. v. ARTHUR L. MARTELLA. P&S Docket No. 6429. Decided November 10, 1986.

Complainant, *pro se*.

Robert Dowd, Hanford, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.) begun by a complaint received on March 30, 1984, alleging in substance market agency failure to obtain fair market value when selling consigned livestock. The amount claimed was \$46,290.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on August 6, 1984. A copy of the investigation report was served on complainant on the same day. An answer and request for oral hearing was received from respondent on September 27 after an extension of time. A copy thereof was served on complainant on October 12.

An oral hearing as requested was held on January 29 and 31, and February 1, 1985, in Visalia, California, before John J. Casey of the Office of the General Counsel of this Department. Complainant was accompanied and assisted by Mr. Peter Ventura, Bakersfield, a member of the Bar, who, however, did not enter appearance as counsel. Respondent was represented by Robert M. Dowd, Esq., Hanford. Complainant, respondent, and three witnesses testified. One exhibit was received. Briefs were filed by both sides.

The case involves a series of transactions in which a total of 108 Holstein heifers of complainant, a few fresh, having just calved, the rest springers, about to calve, were consigned to respondent, and sold by respondent, as follows:

Date 1984	Con- signed	Sold	Bal- ance
1/20	28		28
2/22		22	06
2/26	16		22
2/27	03		25
2/28	05		30
2/28	01		31
2/29		19	12
3/05	01		13

Date 1984	Con- signed	Sold	Bal- ance
3/07		12	01
3/09	50		51
3/10	03		54
3/14	01		55
3/14		46	09
3/21		05	04
3/28		04	00

The first 28 were culls, shipped to respondent to be fed until they looked better, then sold. The complaint did not allege wrongdoing in the February 22 sale of 22 of those. The contention of wrongdoing referred to the later sales, in that the average price brought by the animals sold later was lower than the average price brought by 22 culls on February 22. Complainant's contention was not established by a preponderance of the evidence as explained hereinafter.

Complainant and Mr. A. Sterling Cole, who pastured complainant's animals on his property and was familiar with them, both testified that, apart from the 28 culls, the animals were of average quality, were range fed, had been lotted with bulls when they weighed about 800 pounds, and had an average weight of about 1,000 pounds at the time of consignment. They described those animals as of a sort which would be expected to bring about average prices for the market for Holstein springer heifers, and higher prices than the 28 culls. Complainant and Mr. Cole were credible when they testified.

Respondent testified in substance that many of those animals were of lower than usual weight for Holstein heifers, springers or fresh, and could not have been sold for higher prices than they brought at the place and respective times of sale. Mr. Richard Iest, who bought 18 of the 28 culls and some of the later animals, and who regularly helps on the farm of his brother, who bought some of the later animals, corroborated this testimony of respondent as to the animals with which he was familiar. Respondent and Mr. Iest were also credible when they testified.

No other witness testified who saw the animals in dispute.

The record shows the weights of a few of the animals according to respondent's scale. Those were sold on a weight basis for slaughter as uneconomic for milking. Those weights were as follows:

Investigation report exhibits	Sale date	Weight in pounds
E-1, 5	2/22	825 *
G-1, 17-20	3/07	950
		775
		865
H-4, 15-16	3/14	745
I-1, 5	3/21	995
J-1, 5	3/28	890

(* one of the 28 culls)

The record contains much discussion of an announcement, made by respondent at the auction, at the time of the sale of 46 of complainant's animals on March 14. The evidence is inconsistent as to the words used, but clearly shows the substance. It was that some of the animals had needed assistance from respondent and employees of his in calving at respondent's market, and that, on the basis of that experience, buyers of the remaining springers had better take precautions to avoid loss of them in calving. A finding of unfairness to complainant in the making of that announcement is not established by the evidence in the record as explained hereinafter.

The account of sale issued to complainant (Investigation report exhibits H-1-4) shows only one fresh animal, tag no. 659. However, other documents in the record show fresh animals of complainant sold on that date as follows:

Investigation report exhibits H-:	Tag nos.
34-39	658
11-12	659
11-12	677
28-29	678
20-23	679
11-12	832
28-30	835-6 (2)
34-39	837
18-16	844
14-16	873
17-19	966
34-39	967
20-22	968
34-39	969
28-31	970

Thus the record shows that 16 were fresh, of the 46 animals of complainant sold that day. This is credible in view of the testimony

of Mr. Cole that the basis for selection of such animals for market, other than the 28 culls, was that he, Mr. Cole, did not have a milking operation and those animals were close to freshening.

Respondent testified that some animals of complainant which calved on his property, before that announcement, needed assistance in calving. He was credible when he did so. Also, since the record shows that less than 16 were fresh when shipped to respondent's market, at least some must have calved there. A market agency like respondent, selling consigned animals, has a duty to the consignor to sell at the highest price obtainable at the time and place of sale, but also has a duty to the buyers not to defraud them. This is not to make a finding that some animals of complainant required assistance in calving at the market, that it would have been fraudulent not to make the announcement, or that the announcement was compelled by the Act. Such a finding is not necessary to a decision in this case. What we hold is, as stated above, that unfairness to complainant in the making of the announcement is not established by the evidence in the record.

A few of complainant's animals were bought by dealers who buy and sell on speculation for their own accounts, and resold shortly afterward at higher prices elsewhere. Complainant would draw the conclusion from this that the sales to those dealers were not at the best prices obtainable at respondent's market at the respective times of sale. Such a conclusion does not follow. Such dealers, notwithstanding the names they get called, such as "scalpers," and the understandable fury of persons whose animals are sold to them, perform useful economic functions, sometimes unintentionally, including enforcing an equilibrium in prices in different locations. The fact that such dealers survive in business shows that animals regularly get bought at one place and resold quickly at another at a higher price.

Some of the animals were sold by private treaty, not at auction. Complainant appears to contend that this was unfair to him. It was not. This is entirely customary in the livestock business. It would be unfair only to a consignor of animals who directs the market agency to sell them only at auction.

Respondent showed some confusion of complainant's animals with some of Mr. Cole's animals which were consigned to the market during the same time period, in statements he made some time after the sales in question. Also, one invoice for animals sold to Mr. Iest, some from complainant recorded on one line, and some from Mr. Cole recorded on the adjoining line, has the sellers' names and brands transposed. Complainant would draw a conclusion from this that the animals were mixed at the market, or that

respondent must have been thinking of animals of Mr. Cole and not animals of complainant when he made the announcement on March 14. Such a conclusion is not compelled by such facts.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

JAMES HOENE v. INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION
and SAINT LOUIS NATIONAL STOCKYARDS COMPANY. P&S Docket
No. 6470. Decided November 24, 1986.

Complainant, *pro se*.

Respondents, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.) begun by a complaint received on May 23, 1984 and amended October 1, alleging in substance a mixup of animals shipped to the stockyard and consigned to the commission firm for sale. The amount claimed was \$3,720.60.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on November 5, 1984. A copy of the investigation report was served on complainant on the same day. No answer was received from either respondent, but respondent commission firm filed a written request for an oral hearing. Copies of the request were promptly served on each party other than the one filing it.

It is undisputed, particularly in view of the lack of any answer from either respondent, that a mixup took place. However, the alle-

gations of the complaint, which are deemed to be admitted by the failure to file answers, do not include an allegation as to who mixed complainant's animals with others. Thus, notwithstanding the failures to file answers, an oral hearing as requested was held on April 12, 1985 in Greenville, Illinois, before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Complainant and four witnesses testified. No exhibit was received. No brief was filed.

The following is undisputed. On April 1, 1984, 26 animals were loaded by complainant on a truck of Mr. Leroy Krampe. Complainant did not accompany the animals to the National Stockyards. Twenty six animals were delivered on Mr. Krampe's truck to the National Stockyards with instructions that they were to be consigned to respondent Producers for sale there for complainant's account. Twenty six animals were so consigned. The next morning, 26 animals were so sold.

It is further undisputed that they were not all the same animals. Complainant testified credibly that his animals had an average weight of about 1,250 pounds by his estimate and included at least five herefords. It is undisputed that the animals sold had an average weight of 1,090 pounds and included no more than three herefords.

The record, even with the allegations of the complaint deemed to be admitted, does not contain anything to show who mixed complainant's animals with others before they were sold. There is precedent for shifting the burden to respondents in a case to furnish information to exonerate themselves, and for holding liable any who do not. However, in such a case, the persons who are made respondents must include every person who could have caused the damage. See *Graff v. United Stockyards Corp.*, 37 Ag. Dec. 529 (1978); and *Loizzo v. St. Francis Hospital*, 121 Ill. App. 3d 172, 76 Ill. Dec. 677, 459 N.E.2d 314 (1984). The trucker having had exclusive custody of the animals for a time between their departure from complainant's farm and their sale, the burden of proof cannot be so shifted without the trucker as a respondent in the case.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

JOSEPH CUTTONE v. USDA

Volume 45 Number 6

COURT DECISIONS

CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE CO. v. UNITED STATES DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA. Civil Action 85-1591 (USDA PACA Docket No. 2-6761). Decided November 10, 1986.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

BEFORE: WALD, CHIEF JUDGE AND EDWARDS AND STARR, CIRCUIT JUDGES.

PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY OF AGRICULTURE

This case came to be heard on the record on petition for review from the decision and order of the Secretary of Agriculture and briefs were filed by the parties. The issues have been accorded full consideration by the court and occasion no need for a published opinion. *See* Local Rule 13(c). On consideration of the issues and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the decision and order of the Secretary of Agriculture be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14.

Per Curiam

MEMORANDUM

Carl D. Cuttone, doing business as Joseph A. Cuttone Co., is licensed as a merchant and dealer under the Perishable Agricultural Commodities Act ("Act"). *See* 7 U.S.C. § 499c (1982). On March 18, 1985, the Department of Agriculture ("Department") initiated a disciplinary proceeding against Cuttone alleging that he had failed to make full payment promptly for agricultural commodities. *See* 7 U.S.C. § 499b(4) (1982). The Department sought revocation of Cuttone's license. At the time, Cuttone's license had been suspended, in an unrelated proceeding, for failure to pay a reparation award.

The Department served a copy of the complaint on Cuttone by certified mail. The complaint was accompanied by a letter advising Cuttone that an answer was due within 20 days of his receipt of the complaint. The complaint and letter were sent to "Carl D. Cuttone d/b/a Joseph A. Cuttone Co." at his business address. The return receipt was signed by "Joesph A. Cuttone".

On April 25, 1985, the Department moved for a decision by the Administrative Law Judge ("ALJ") because Cuttone had failed to file a timely answer. This motion was served on Cuttone in the

same manner as the complaint, and the return receipt was signed "John J. Cuttone".

Cuttone filed a timely opposition to the motion for a decision and a motion for leave to file an answer. He claimed he had never received a copy of the complaint. The ALJ denied the motion for leave to file an answer stating that it appeared that Cuttone was properly served. The Judicial Officer of the Department adopted the default order of the ALJ. The Judicial Officer stated:

Respondent claims that he was not properly served with a copy of the complaint. But the record shows that a copy of the complaint was sent by certified mail to respondent at his last business address and the return receipt was signed by "Joesph A. Cuttone" (respondent conducts his business in the name of "Joesph A. Cuttone Co."). That constitutes adequate service under the rules of practice.

Cuttone seeks review of this final agency order in this court.

Cuttone argues that he did not receive actual notice of the revocation proceedings and therefore was not accorded due process. He argues that because he was suspended at the time of service, the Department should at least have sent the notice to his home address. We disagree. The notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). Due process does not require actual notice in every case. *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 240-42 (3d Cir. 1979); *NLRB v. Clark*, 468 F.2d 459, 464 (5th Cir. 1972); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957). The suspension of Cuttone's license did not bar him from his place of business. See 7 CFR § 46.35(c) (1986). Thus, Cuttone's reliance on *Robinson v. Hanrahan*, 409 U.S. 38 (1972), is misplaced.

Cuttone also argues that the Department failed to comply with the statutory and regulatory requirements for notice. He claims that they require actual notice. We disagree. Section 6(c) of the Act requires that the complaint be "served by registered mail or by certified mail or otherwise on the person concerned . . ." 7 U.S.C. § 499f(c) (1982). Cuttone offers no support for his assertion that the statute requires actual notice. To infer such a requirement would be contrary to a common sense reading of the statute. The regulations provide that the complaint "shall be served upon the parties" in one of three ways. 7 CFR § 1.147(b) (1986). Cuttone argues that these words require actual notice in every case. The Judicial Officer, however, specifically rejected that interpretation, holding that

the service in this case was adequate under this regulation. The agency's construction of its regulation is controlling unless it is plainly erroneous or inconsistent with its language. *United States v. Larionoff*, 431 U.S. 864, 872 (1977). We hold that the Department's construction is not plainly erroneous.

Finally, Cuttone argues that the Department violated its regulations by denying the motion for leave to file an answer and granting the motion for a decision. Whether to grant an extension of time to file an answer or to enter a default is within the discretion of the Judicial Officer and the ALJ. See 7 CFR § 1.139, 1.147(c) (1986). The ALJ did not abuse her discretion by entering the default order. Cuttone has never filed an affidavit that he did not receive the complaint and never adequately explained how he received the motion for a decision but not the complaint.

PRANGE FOODS CORPORATION and ST. JOSEPH BANK AND TRUST COMPANY d/b/a CAPITAL CREDIT COMPANY v. DEBRUYN PRODUCE COMPANY, S&S FARMS, INC., CENTRAL MICHIGAN PACKING, BARBEE PRODUCE, MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, DWAN'S FRUIT FARM, VERN HAUCH, WESLEY DANNEFFEL, SOUTHERN MICHIGAN COLD STORAGE COMPANY, WILDERNESS FOODS, GATEWAY REFRIGERATION COMPANY, MERCHANT'S REFRIGERATING COMPANY, BROCKPORT COLD STORAGE, PAW PAW FREEZERS, and RICHARD REMES, Civil Action K85-137 (USDA PACA Docket No. 2-1799). Decided December 15, 1986.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN

BEFORE: RICHARD A. ENSLEN, U.S. DISTRICT JUDGE

REVIEW OF THE SPECIAL MASTER'S RECOMMENDATION

This case is before the Court for review of the Special Master's Recommendation dated August 1, 1986, together with the Report he entered on May 8, 1986. The pertinent facts are fully stated in the Special Master's Report, *St. Joseph Bank and Trust Co. v. DeBruyn Product Co. (In re Prange Foods Corp.)*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986), and the Court will only briefly summarize them here. This adversary proceeding arises out of a bankruptcy proceeding involving Prange Foods Corporation. Prange Foods was a dealer in fresh vegetables. Plaintiff St. Joseph Bank and Trust Company (d/b/a Capital Credit Company) was Prange Foods' secured lender. Defendants are various warehousemen and growers

who were creditors of Prange Foods. Plaintiff initiated this action in bankruptcy court on January 22, 1985, seeking a declaration of its rights in the debtor's inventory and accounts receivables vis-à-vis the defendants. On May 24, 1985 the Court withdrew its reference of this proceeding to the bankruptcy court. See 28 U.S.C. § 157(d). It concurrently appointed Bankruptcy Judge Howard as a Special Master pursuant to rule 53 of the Federal Rules of Civil Procedure to handle the pretrial proceedings and to prepare a report and recommendation on any dispositive motions filed by the parties.

In December of 1985 plaintiff and the grower defendants filed cross-motions for summary judgment. Pursuant to the Order of Reference, the Special Master prepared the Report and Recommendation on such motions referred to above. By this time, the debtor's assets had been liquidated, and the amounts representing proceeds from the sale of perishable agricultural commodities had been placed in escrow. Four grower defendants—Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") (who, as the Special Master noted, is a trade organization that represents a number of individual growers whose claims the Court must consider separately), Dwan's Fruit Farm, Vern Hauch, and Wesley Danneffel—filed timely objections to the Special Master's Report and Recommendation. Pursuant to rule 72 of the Federal Rules of Civil Procedure, the Court has reviewed *de novo* the Report and Recommendation and the parties' motions in light of these defendants' objections. Order of Reference (May 24, 1985); FRCP 72(b); see also FRCP 53(e). I note here that all of the other defendants either have entered into settlements with plaintiff or have had default judgments entered against them.

The Special Master determined that the objecting defendants' claims are subordinate to plaintiff's claims, and hence that they should recover none of the funds in the escrow account. For the reasons discussed below, the Court finds that the Special Master's determinations are correct, and will adopt his Report and Recommendation as modified by this opinion. In this opinion the Court will first review the Special Master's legal conclusions. It will then apply those conclusions to the claims raised by MACMA, Dwan's, Hauch, and Danneffel. The Court assumes that the reader of this opinion has already reviewed the Special Master's Report and Recommendation, which as I indicated has been published.

The Special Master identified eleven (11) issues of law that he felt controlled his recommended disposition of the parties' claims. The Court will briefly discuss each issue.

The first issue is whether the 1984 amendments to the Perishable Agricultural Commodities Act ("PACA") became effective when President Reagan signed them into law on May 7, 1984, or when the regulations the Department of Agriculture promulgated pursuant to the amendments took effect, which was on December 20, 1984. Like the Special Master, the Court believes that this issue was correctly resolved in the case of *In re Fresh Approach Inc.*, 48 Bankr. 926 (Bankr. N.D. Tex. 1985). I believe that the amendments are sufficiently specific to be self-executing, and that Congress intended for them to be effective immediately. The amendments thus cover the produce defendants sold to Prange Foods in the fall of 1984.

The second issue is whether the regulations apply retroactively. Again, the Court agrees with the Special Master that the bankruptcy court correctly analyzed this issue in *Fresh Approach*. The regulations state that they apply to "all transactions existing as of and entered into on or after the[ir] effective date." 7 CFR § 46.46(a). The Court interprets the phrase existing transactions as encompassing transactions for which the produce grower had not yet received final payment.

The third issue is whether those defendants who had contracts calling for payment more than thirty days from the date of delivery qualify for protection under the amendments. The Court agrees with the Special Master that those growers who had written contracts with Prange Foods can qualify for protection even though such contracts called for payment more than thirty days from the date of delivery. I cannot penalize any grower who complied with the plain language of the statute.

With regard to the fourth issue, which concerns growers who had oral contracts with Prange Foods, the Court notes that the Special Master primarily discussed the arguments of DeBruyn Produce, who has settled its claims with plaintiff. This issue also has significance, however, for those MACMA members who had contracts for the sale of peppers with Prange Foods. MACMA argues that these contracts were written. As the Court discusses below, however, it agrees with the Special Master that these contracts were not written contracts within the meaning of the PACA trust fund provisions. It thus becomes important to determine what kinds of oral contracts, if any, can qualify a grower for protection under the amendments. On this point the Court agrees with the Special Master that the new regulations, which provide that only those oral contracts that provide for payment within ten days of delivery can qualify for protection, control. A claimant on an oral contract

thus has forty days after delivery in which to file a written notice of his claim under the amendments.

The Court has nothing to add to the Special Master's discussion of the fifth issue, which concerns whether the date of "receipt and acceptance" of produce may be understood as referring to either the shipment date or the invoice date. I similarly believe that the Special Master fully and correctly analyzed the sixth issue, which is whether the filing of a petition for bankruptcy by the debtor either stayed the filing deadline under the amendments or excused the defendants from the filing requirement. The objecting defendants argue that the filing requirement was stayed or excused when Prange Foods filed for bankruptcy. Although defendants make a good policy argument for their position, the Court agrees with the Special Master's resolution of this issue.

The seventh issue is whether the defendant's notice of intent to preserve their trust fund benefits had to comply fully with the requirements set forth in the regulations. I agree with the Special Master that any notices filed after the regulations were published in the Federal Register, which was on November 20, 1984, had to comply with the regulatory requirements. The Court notes here that this ruling means that the notice MACMA filed on December 3, 1984 was not effective. The Court also agrees with the Special Master's suggested disposition of the eighth issue, which is whether the amended notices filed by MACMA relate back to the filing date of its incomplete December 5th notice. The Special Master correctly held that they do not.

The ninth issue is whether the "filing" of a notice under the amendments occurs upon mailing of the notice to the Secretary or upon the Secretary's receipt of the notice. The Special Master correctly held that "filing" occurs upon receipt of the notice.

The Court is somewhat troubled by the Special Master's resolution of the tenth issue. As I indicated above, I believe that he correctly resolved this issue by ruling that the pepper growers did not have written contracts with Prange Foods within the meaning of the amendments. The payment terms of the "contracts" between the pepper growers and Prange Foods were in writing, *i.e.*, the Salverson letter. The Court does not believe, however, that the growers and Prange Foods "expressly agreed in writing" to their payment terms before "entering into" their transactions. *See* 7 U.S.C. § 499e(c)(3)(ii). I think that it is clear that Congress meant for section 499e(c)(3)(ii) to cover contracts like the one between Prange Foods and Richard Vanden Heuvel. It did not intend for the section to cover written offers that are accepted by performance. The

Court is sympathetic to the pepper growers' argument, but does not believe it is correct under the amendments.

Finally, the Court believes that the Special Master's eleventh issue is inapplicable because Mr. Tidey's claim must be rejected on other grounds. At this point, the Special Master asked the parties to determine how the above legal rulings applied to the diverse factual situations before it. To clarify the record, however, the Court believes it should explicitly apply these rulings to the claims of the objecting defendants.

The first claims the Court will discuss are those of the MACMA defendants. The first MACMA claims the Court will discuss are the zucchini claims filed by Carl Tidey and Greg Tidey. The parties agree that Carl Tidey had a written contract with Prange Foods, but disagree about the status of Greg Tidey's contract. I do not believe that the factual issue regarding Greg Tidey's contract is material, however, because even assuming that this contract was written, the Tideys' notice of their PACA claims was not timely. Specifically, defendants acknowledge that the notice was due on November 17, 1984 if it was not excused by the filing of the bankruptcy petition by Prange. The Court has already ruled that the filing of the petition did not stay or excuse the notice requirement. The Special Master therefore properly concluded that the Tideys are not entitled to prevail on their claims.

The next MACMA claims are those of the pepper growers, who are defendants Ronald Brush, Wesley Danneffel, the Dominion Brothers, Charles Goodrich, A.L. Karnemaat, Robert Kramer, Ed Kretchman, the Marschke Brothers, Joe Scherer, Arthur Whitaker, Dwan's Fruit Farm, and Vern Hauch. Since these growers had oral contracts with Prange Foods, they are covered under the amendments only if they had filed written notice of their claims within forty days—i.e., thirty days after the expiration of the ten day payment period—after their last delivery of peppers to Prange Foods. In each case, the defendant filed an untimely notice of his/its claim. The Court notes that defendants Dwan's and Hauch filed their claims close to the forty day period, but that such claims still were untimely.

The next claimant is Richard Smith, who had sold some snap beans to Prange Foods. In Mr. Smith's case, assuming that he had a written contract with Prange Foods (which is subject to dispute), his written notice of his PACA claim was due, at the latest, on March 1, 1985. The Court determined this filing deadline by giving Mr. Smith the benefit of the Special Master's ruling on issue number three. Mr. Smith failed, however, to meet this deadline as he did not file a notice that conformed with the regulations until

sometime after June 27, 1985. The Special Master thus correctly rejected his claim.

The final claim is Mr. Danneffel's claim for payment for cabbage he had sold to Prange Foods. The filing deadline for notice of this claim was either November eighteenth, nineteenth, or twentieth, 1984. Since Mr. Danneffel did not file his notice until December 5, 1984 (even assuming that notice was sufficient), the Special Master correctly rejected his claim.

In summary, the Court agrees with the Special Master's Report and his Recommendation, and adopts them as clarified and/or modified by this opinion. The Court appreciates Judge Howard's assistance on this case. I also complement the attorneys on the excellent quality of their written submissions.

In accordance with the opinion dated December 12, 1986;

IT IS HEREBY ORDERED that the Special Master's Report of May 8, 1986 and his Recommendation of August 1, 1986 are ADOPTED, as clarified and/or modified, as the opinion of the Court;

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment is GRANTED with respect to the objecting defendants, and DENIED as moot with respect to the other defendants;

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by defendants Michigan Agricultural Cooperative Marketing Association, Inc., Dwan's Fruit Farm, Vern Hauch, and Wesley Danneffel is DENIED;

IT IS FURTHER ORDERED that the Motions for Summary Judgment filed by defendants Central Michigan Packing, DeBruyn Produce, and S & S Farms, Inc. are DENIED as being moot;

IT IS FURTHER ORDERED that plaintiff's Motion to Strike Defendant MACMA's Jury Trial Demand and defendant MACMA's Objection to Report and Recommendation of Special Master re: Jury Trial are DENIED as being moot;

IT IS FURTHER ORDERED that JUDGMENT is entered for plaintiff and against the objecting defendants.

DISCIPLINARY DECISIONS

In re: MARY FRAN HAMILTON and M. F. HAMILTON, INC. PACA
Docket No. 2-7166. Decided October 9, 1986.

Failure to pay promptly—Revocation of license—Application for license denied.
Respondent purchased and received fruits and vegetables in interstate commerce but failed to pay promptly for these purchases. Respondent's license was revoked and her application of a license was denied.

Kenneth Vail, for complainant.

Ian MacDonald, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a Notice to Show Cause and Complaint proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act," instituted by a complaint filed on April 30, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1985 through August 1985, M. F. Hamilton, Inc., purchased, received and accepted, in interstate commerce, from two sellers, seven lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices on balances thereof in the total amount of \$218,255.62. It is further alleged in the Notice to Show Cause and Complaint that during the period of the violations, Mary Fran Hamilton was the president, secretary, director and 100% stockholder of M. F. Hamilton, Inc.

A copy of the Notice to Show Cause and Complaint was served upon the respondents. The respondents filed a timely answer thereto in which they admit all of the material allegations but claim that the amount remaining unpaid is \$20,000 less than the amount alleged. For purposes of this decision, complainant does not dispute respondents' statement in this regard. Respondents have further agreed that the issues should be determined on the pleadings. Each party has filed a motion for decision, a proposed decision and order and a supporting memorandum. Upon consideration of those documents, the arguments of the parties, and what constitutes the evidence of record in this proceeding, complainant's motion is hereby granted and the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139). Attached to this Decision and Order is a copy of the Memorandum filed by complainant in support of its motion for decision, which has been found to correctly state con-

trolling law and existing Departmental policy and is incorporated herewith and adopted as part of this Decision.

FINDINGS OF FACT

1. Respondent M. F. Hamilton, Inc., is a Hawaiian corporation whose address is 4620 Kalaniiki Place, Honolulu, Hawaii 96821.

2. Pursuant to the licensing provisions of the Act, license number 820713 was issued to respondent M. F. Hamilton, Inc., on March 16, 1982. This license was renewed annually, but terminated on March 16, 1986, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)) when it failed to pay the required annual license fee.

3. Mary Fran Hamilton is, or was, the president, secretary, director, and 100% stockholder of M. F. Hamilton, Inc., during the period of violations alleged herein.

4. As more fully set forth in paragraph 7 of the Notice to Show Cause and Complaint, during the period May 1985 through August 1985, respondent M. F. Hamilton, Inc., purchased, received and accepted in interstate commerce, from two different sellers, seven lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices. The total amount past due and unpaid to these sellers is \$198,255.62.

5. Mary Fran Hamilton was responsible for the violations set forth in paragraph 4 above.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the seven transactions set forth in Finding of Fact 4 constitutes wilful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Mary Fran Hamilton was responsible for such violations and has engaged in practices of the character prohibited by the Act prior to the submission of the application.

ORDER

Respondent M. F. Hamilton, Inc.'s license is revoked.

Respondent Mary Fran Hamilton's application for a license is denied.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order will become final and effective without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice.

Copies hereof shall be served upon the parties.

[This decision and order became final November 18, 1986—Ed.]

In re: MARY FRAN HAMILTON and M.F. HAMILTON, INC. PACA
Docket No. 2-7166. Decided November 20, 1986.

The Judicial Officer denied a late appeal filed on the day the initial decision had become final. However, even if respondents' appeal had been timely filed, it would have been to no avail because respondents' argument that an expired license cannot be revoked is without merit. Furthermore, if a timely appeal had been filed, the Judicial Officer would have included a finding that respondents have committed repeated and flagrant violations of § 2(4) of the Act, which would have the same effect on respondents and all persons responsibly connected with respondents as a revocation order.

Kenneth Vail, for complainant.

Ian MacDonald, Honolulu, Hawaii, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING LATE APPEAL

Respondent M. F. Hamilton, Inc., filed an appeal with the Hearing Clerk on November 18, 1986, which is the day the initial decision had become final and effective. Accordingly, respondent's appeal must be dismissed because it was not timely filed. See *In re Bushelle Cattle Co.*, 45 Agric. Dec. ____ (May 14, 1986); *In re Hulings*, 44 Agric. Dec. ____ (Jan. 15, 1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Powell*, 44 Agric. Dec. ____ (May 28, 1985), the latter of which is attached as Appendix A.

Even if respondent's appeal had been timely filed, it would have been to no avail. Respondent contends that an expired license cannot be revoked. However, it has been held that an expired license under the Perishable Agricultural Commodities Act can be suspended or revoked. See Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, § 419 (1981 and 1986 Cum. Supp.), attached as Appendix B. Nonetheless, in order to avoid any doubt with respect to the matter, if respondent had filed a timely appeal, the Judicial Officer would have included in the order, in addition to the revocation provisions, an additional statement that respondents have committed repeated and flagrant violations of § 2(4) of the Act (7 U.S.C. § 499b(4)). See, e.g., *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. ____ (Jan. 27, 1986), attached as Appendix C. That would have the same effect on respondents and all persons responsibly connected with respondents as a revocation order. As stated in *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2440-

41 (1982) (order revoked respondent's license and also found that respondent has committed repeated and flagrant violations of § 2(4)), *aff'd*, 728 F.2d 347 (6th Cir. 1984):

Although respondent's license is not presently in effect, it has been held that a terminated license can be suspended or revoked. [Footnote omitted.] But it is of no practical consequence whether respondent's license is revoked since it has been found that respondent has committed flagrant and repeated violations of the Act, and, as a result of that finding, the same consequences flow to the respondent and those responsibly connected with respondent as flow from a revocation order (see note 9, *supra*).

Specifically, as a result of the finding that respondent has committed flagrant and repeated violations of the Act, respondent cannot again become licensed under the Act for two years after the effective date of the Order issued in this case (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)). Similarly, the persons "responsibly connected" with respondent cannot be licensed under the Act for two years (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)); and they cannot work for another licensee under the Act for one year (7 U.S.C. § 499d(b)). After one year, the Secretary may approve their employment by another licensee if the licensee furnishes a satisfactory bond; after two years, the Secretary may approve their employment by another licensee without a bond (7 U.S.C. § 499h(b)).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent's appeal is denied since it was not timely filed.

APPENDIX A

In re Powell, 44 Agric. Dec. ____ (May 28, 1985).
[Omitted.—Ed.]

APPENDIX B

Excerpt from Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, § 4.19 (1981).

§ 4.19 Disciplinary Orders Issued in Formal Cases

Disciplinary orders issued in formal cases are of three types: suspending a license,¹⁶⁵ revoking a license¹⁶⁶ or simply finding that a person has committed a flagrant or repeated violation of § 2 of the act.¹⁶⁷ The act does not provide authority for issuing cease and desist orders.

As discussed in §§ 4.04 and 4.06, a suspension or revocation order has consequences affecting licensing and employment involving the violator or anyone "responsibly connected"¹⁶⁸ with the violator. In view of these collateral effects, a suspension or revocation order is meaningful even if the license of the violator terminates (e.g., for non-payment of the annual fee) before issuance of the final order. It has been held that such an order can be issued notwithstanding the termination of the license prior to the issuance of the order.¹⁶⁹

As a practical matter, however, the PACA Regulatory Branch generally does not request a suspension or revocation order where the license is no longer in effect, but requests, instead, that a finding be made that the respondent

¹⁶⁵ See § 4.05.

¹⁶⁶ *Id.*

¹⁶⁷ See § 4.12. In addition, an order may be issued denying an applicant's request for a license, but this is regarded as a licensing action rather than a disciplinary action, see § 4.04.

¹⁶⁸ The definition of "responsibly connected" and the procedure for determining responsibly connected persons are discussed in § 4.21.

¹⁶⁹ *In re M&H Produce Co*, 34 Agric Dec 700, 750 (1975), *affd mem*, 549 F2d 830 (DC Cir), *cert denied*, 434 US 920 (1977); *In re J Acevedo & Sons*, 34 Agric Dec 120, 198-40, *affd per curiam*, 524 F2d 977 (5th Cir 1975); *In re George Steinberg & Son, Inc*, 32 Agric Dec 236, 250-53 (1973), *affd*, 491 F2d 988 (2d Cir), *cert denied*, 419 US 830 (1974); *accord*, *In re Kafcsak*, 39 Agric Dec 683, 686 (1980), *appeal docketed*, No. 80-3406 (6th Cir June 26, 1980); *In re Atlantic Produce Co*, 35 Agric Dec 1631, 1633 (1976), *affd mem*, 568 F2d 772 (4th Cir), *cert denied*, 439 US 819 (1978); and see *Quinn v Butz*, 510 F2d 743, 749-50 (DC Cir 1975). The legislative history of the act suggests that suspension or revocation orders cannot be issued as to nonactive licenses, HR Rep No 1546, 87th Cong, 2d Sess 8 (1962); S Rep No 750, 87th Cong, 1st Sess 7 (1961); S Rep No 554, 73d Cong, 2d Sess 2 (1934); HR Rep No 489, 73d Cong, 2d Sess 2 (1934); and see *Marvin Tragash Co v USDA*, 524 F2d 1255, 1258 (5th Cir 1975), but the matter is of no practical consequence, at least as far as revocation is concerned, since a finding that a violation was flagrant or repeated has the same effect as a revocation order, see note 170 and related text. However, if a suspension order could not be issued as to a nonactive license, the much more severe order finding that a violation was flagrant or repeated would have to be issued, where appropriate. The suspension of a terminated license was upheld, without discussing the authority to take such action, in *Mandell, Spector, Rudolph Co v United States*, 364 F2d 889, 893-94 (3d Cir 1966), *cert denied*, 385 US 1008 (1967).

has committed a flagrant or repeated violation of § 2 of the act. Such a finding has the same licensing and employment consequences as to the respondent and those "responsibly connected" with the respondent as an order revoking the respondent's license.¹⁷⁰ Nonetheless, it can be made without first sending a warning letter,¹⁷¹ irrespective of whether the violation is wilful¹⁷² or the license has terminated.¹⁷³

About 45 percent of the disciplinary proceedings instituted under the act are disposed of by consent orders, usually suspending the respondent's license. A few consent orders revoke the respondent's license. The Regulatory Branch requires the respondent to admit the violations in any consent settlement.

§ 4.19 Disciplinary Orders Issued in Formal Cases

Add to note 169, fourth line, before "accord":

In re Perfect Potato Packers, Inc, 45 Agric Dec ____ (Feb 14, 1986); *In re Melvin Beene Produce Co*, 41 Agric Dec 2422, 2440 (1982), *affd*, 728 F2d 347 (6th Cir 1984); *In re United Fruit & Vegetable Co*, 40 Agric Dec 396, 402 (1981), *affd*, 668 F2d 983 (8th Cir), *cert denied*, 456 US 1007 (1982).

Add to note 169, sixth line, after end of In re Kafcsak citation:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re Connecticut Celery Co*, 40 Agric Dec 1181, 1150-52 (1981).

¹⁷⁰ See §§ 4.04, 4.06 and 4.12; *In re John H Norman & Sons Distrib Co*, 37 Agric Dec 705, 714-15 (1978); *In re M&H Produce Co*, 34 Agric Dec 700, 750-51 (1975), *affd mem*, 549 F2d 830 (DC Cir), *cert denied*, 434 US 920 (1977).

¹⁷¹ See § 4.17, note 158 and related text.

¹⁷² *Marvin Tragash Co v USDA*, 524 F2d 1255, 1256 n 1 (5th Cir 1975); *In re Kafcsak*, 39 Agric Dec 683, 685-87 (1980), *appeal docketed*, No 80-3406 (6th Cir June 26, 1980); *accord*, *In re Atlantic Produce Co*, 35 Agric Dec 1631, 1641 (1976), *affd mem*, 568 F2d 772 (4th Cir), *cert denied*, 439 US 819 (1978); *In re George Steinberg & Son, Inc*, 32 Agric Dec 236, 262-63 (1973), *affd*, 491 F2d 988, 993-94 (2d Cir), *cert denied*, 419 US 830 (1974).

¹⁷³ *Quinn v Butz*, 510 F2d 743, 750 (DC Cir 1975); *In re Kafcsak*, 39 Agric Dec 683, 685-87 (1980), *appeal docketed*, No 80-3406 (6th Cir June 26, 1980); *In re Atlantic Produce Co*, 35 Agric Dec 1631, 1633, 1643 (1976), *affd mem*, 568 F2d 772 (4th Cir), *cert denied*, 439 US 819 (1978); *In re George Steinberg & Son, Inc*, 32 Agric Dec 236, 243-45, 261-63, 270 (1973), *affd*, 491 F2d 988 (2d Cir), *cert denied*, 419 US 830 (1974).

In the first and second paragraphs on page 354, delete "Regulatory Branch" and substitute:

PACA Branch

Add to note 170:

In re Connecticut Celery Co, 40 Agric Dec 1131, 1151-52 (1981); *In re United Fruit & Vegetable Co*, 40 Agric Dec 396, 404 n 23 (1981), *affd*, 668 F2d 983 (8th Cir), *cert denied*, 456 US 1007 (1982).

Add to note 172:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re A Pellegrino & Sons, Inc*, 44 Agric Dec ____ (Aug 21, 1985), *appeal docketed*, No 85-1590 (DC Cir Sept 19, 1985); *In re Finer Foods Sales Co*, 41 Agric Dec 1154, 1191-92 (1982), *affd*, 708 F2d 774 (DC Cir 1983); *In re CB Foods, Inc*, 40 Agric Dec 961, 971 (1981), *affd mem*, 681 F2d 804 (3d Cir), *cert denied*, 459 US 831 (1982).

Add to note 173:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re CB Foods, Inc*, 40 Agric Dec 961, 971 (1981), *affd mem*, 681 F2d 804 (3d Cir), *cert denied*, 459 US 831 (1982).

APPENDIX C

In re Top Quality Fruit & Produce Distributors, Inc., 45 Agric. Dec. ____ (Jan. 27, 1986).

[Omitted.—Ed.]

In re: E. M. OATES & COMPANY, INC.. PACA Docket No. 2-7246. Decided October 20, 1986.

Failure to pay promptly—Publication of the facts.

Andrew Y. Stanton, for complainant.

Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER (DEFAULT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.* hereinafter referred to as the "Act", instituted by a complaint filed on July 21, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1984 through December 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 25 sellers, 95 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$228,511.43.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent E. M. Oates & Company, Inc. is a corporation, whose address is Unit No. 33, Produce Row, St. Louis, Missouri 63131.

2. Pursuant to the licensing provisions of the Act, license number 830733 was issued to respondent on March 25, 1983. This license was renewed annually, but terminated on March 25, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period December 1984 through December 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 25 sellers, 95 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full pay-

ment promptly of the agreed purchase prices, in the total amount of \$228,511.43.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 95 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 85 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This default decision and order became final December 2, 1986.—Ed.]

In re: AL NAGELBERG & Co., INC. PACA Docket No. 2-7064. Decided November 20, 1986.

Failure to pay—License revoked.

Respondent failed to pay promptly or fully for 200 transactions, constituting repeated and flagrant violations of the Act. Respondent's license is revoked.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on January 21, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February through May, 1985, respondent received and accepted on con-

signment, in interstate and foreign commerce, from 16 sellers, 70 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds or balances thereof in the total amount of \$142,580.94. The complaint also alleges that during the period February through May, 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 15 sellers, 130 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of \$692,293.89.

Respondent filed an answer, denying liability, and requesting an oral hearing. Complainant also filed a motion for hearing. An oral hearing was set for September 22, 1986. Respondent subsequently moved for a postponement of the hearing date, to which complainant objected, alleging that respondent was incurring additional produce debts. Respondent's motion was granted and the hearing was rescheduled for November 20, 1986. Prior to the hearing, respondent's counsel indicated that neither respondent nor counsel would be attending the hearing, and, by hand delivered letter of November 18, 1986, advised:

"By letter this date, I have transmitted to Mr. James Frazier, Director of the Fruit and Vegetable Division of PACA, the license certificate of Al Nagelberg & Co., Inc.

With the transmission of this license certificate, I trust there will be no need for further proceedings."

Complainant acknowledged receipt of said license. Both parties were aware that the oral hearing would be held as scheduled.

An oral hearing was held on November 20, 1986. At the hearing, two witnesses testified on behalf of complainant. No one appeared on behalf of respondent. After the introduction of evidence by complainant, complainant moved for the immediate issuance of a decision and order under 7 CFR § 1.141(e). Complainant's motion is hereby granted and the following Decision and Order is issued.

FINDINGS OF FACT

1. Respondent, Al Nagelberg & Co., Inc., is a corporation, whose address is Hunts Point Terminal Market, Row B, Room 216, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 176559 was issued to respondent on June 20, 1958, was renewed annually, presently is in effect, and is next subject to renewal on or before June 20, 1987.

3. As more fully set forth in paragraph 5 of the complaint, during the period February through May, 1985, respondent received and accepted on consignment in interstate and foreign commerce, from 16 sellers, 70 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds or balances thereof, in the total amount of \$142,580.94.

4. As more fully set forth in paragraph 6 of the complaint, during the period February through May, 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 15 sellers, 130 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of \$692,293.89.

5. Since the filing of the complaint, respondent has made numerous additional purchases of perishable agricultural commodities from many different sellers, in interstate and foreign commerce, but has failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of approximately \$800,000.00.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 200 transactions set forth in Findings of Fact 3 and 4 above, and the additional transactions set forth in Finding of Fact 5 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final December 29, 1986.—Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE CO. PACA
Docket No. 2-6761. Decided December 10, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. Respondent's license is revoked effective on the 30th day after service of this order on respondent.

In re: AAA PRODUCE COMPANY. PACA Docket No. 2-7324. Decided
December 18, 1986.

Peter Train, for complainant.

Leslie Davis, St. Louis, Missouri, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

MOTION TO AMEND DECISION AND ORDER

On October 28, 1986, a decision and order, agreed to by the parties, was entered by Administrative Judge Dorothea A. Baker. The order provided that respondent AAA's license was to be revoked, provided, however, that if AAA made restitution in the amount of \$451,000.31 by December 15, 1986, the revocation would be remitted to a suspension of the license for a period of 90 days commencing March 1, 1987.

The parties have agreed to a proposed modification of the order and therefore move that the order of October 28, 1986 be amended on page 3 of the decision by substituting the date of January 5, 1987, for December 15, 1986 as the date by which payment must be made and the date upon which the order shall become effective.

AMENDMENT AND MODIFICATION OF DECISION

The Complainant's Motion to Amend Decision and Order, filed December 17, 1986, is hereby Granted.

The Decision and Order, issued October 28, 1986, is hereby amended and modified as set forth in said Motion to Amend.

Copies hereof shall be served upon the parties.

REPARATION DECISIONS

CLEMENTS CITRUS SALES OF FLORIDA v. GREG REEVES d/b/a REEVES
FUND RAISING Co. PACA Docket No. 2-6914. Decided November 5, 1986.

FOB Sale—Inspection—Failure to prove damages—Reparation awarded.

Respondent purchased numerous loads of fund-raising citrus from complainant and failed to pay for 22 orders. Respondent claimed he paid and also claimed set-offs for a purported rebate the parties entered into as well as a spoilage allowance and advertising allowance. Respondent didn't prove set-offs or payment by preponderance of evidence. Respondent shall pay to complainant, as reparation, \$43,783.45, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Allan R. Kahan, presiding officer.

Roger G. Orr, Fort Pierce, Florida, for complainant.

Clinton W. Lanier, Vero Beach, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). An informal complaint was filed on May 7, 1985. On May 17, 1985, complainant filed a formal complaint in which complainant seeks an award of reparation against respondent in the amount of \$43,783.45 in connection with the shipment of oranges and grapefruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served on each of the parties, and respondent was served with a copy of the complaint. Respondent filed an answer to the complaint denying any liability thereunder, claiming payment of some of the invoices, as well as set-offs equal to or exceeding the amount complainant claimed.

Complainant requested an oral hearing and such hearing was held on January 27, 1986, in Fort Pierce, Florida. Three witnesses testified for complainant, and two witnesses testified on behalf of respondent. Complainant introduced six (6) exhibits, which will hereafter be designated by the prefix CX. Respondent introduced twenty-one (21) exhibits which will hereafter be designated by the prefix RX. References to the transcript will be designated by the prefix Tr.

FINDINGS OF FACT

1. Complainant Henry T. Clements, Jr., is an individual doing business as Clements Citrus Sales of Florida, whose address is P.O. Box 2691, Stuart, Florida 33495.

2. Respondent Greg Reeves is an individual doing business as Reeves Fund Raising Company whose address is 1717 Dixie Highway, Suite 431, Fort Wright, Kentucky 41011. At the times of the transactions involved herein respondent was not licensed under the Act, but was subject to its provisions.

3. On or about November 16, 1984, complainant sold to respondent, on invoice no. 84036-D, 469½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$4,763.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel carton and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$334.75, and paid \$4,428.25.

4. On or about November 19, 1984, complaint sold to respondent, set forth on invoice no. 84046-A, 500 4/5 bushel cartons of oranges and grapefruit for a total price of \$4,325.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

5. On or about November 19, 1984, complainant sold to respondent, set forth on invoice no. 84046-B, 252½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$2,385.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

6. On or about November 19, 1984, complainant sold to respondent, set forth on invoice no. 84046-C, 100 4/5 bushel cartons of oranges for a total price of \$1,000.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 2/5 bushel cartons. Respondent did not pay complainant for said produce.

7. On or about November 28, 1984, complainant sold to respondent, set forth on invoice no. 84073, 1170 4/5 bushel cartons of oranges and grapefruit for a total price of \$12,480.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 2/5 bushel cartons. Respondent made an unauthorized deduction of \$117.50 from the invoice price and paid \$12,362.50.

8. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84076-A, 258 4/5 bushel cartons of oranges and grapefruit for a total price of \$2,487.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of \$68.00 from the invoice price and paid \$2,419.00.

9. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84076-B, 313½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$2,766.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in

4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$19.00 from the invoice price and paid \$2,747.00

10. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84100, 329½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$3,358.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$503.70 from the invoice price and paid \$2,854.30.

11. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84079, 397 4/5 bushel cartons of oranges for a total price of \$4,740.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of \$108.00 from the invoice price and paid \$4,632.00.

12. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84114, 700 4/5 bushel cartons of oranges for a total price of \$7,500.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of \$414.00 from the invoice price and paid \$7,086.00.

13. On or about December 4, 1984, complainant sold to respondent, set forth on invoice no. 84150, 225 4/5 bushel cartons of oranges and grapefruit for a total price of \$2700.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent paid complainant \$2400.00, leaving a balance due of \$300.00 for said produce.

14. On or about December 6, 1984, complainant sold to respondent, set forth on invoice no. 84149, 375 4/5 bushel cartons of oranges for a total price of \$4,275.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

15. On or about December 6, 1984, complainant sold to respondent, set forth on invoice no. 84080-B, 565 4/5 bushel cartons of oranges for a total price of \$6,060.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of \$249.00 from the invoice price and paid \$5,811.00.

16. On or about December 7, 1984, complainant sold to respondent, set forth on invoice no. 84081-A, 450 4/5 bushel cartons of oranges and grapefruit for a total price of \$4,154.75 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

17. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84191-B, 450 4/5 bushel cartons of oranges and grapefruit for a total price of \$3,750.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packed in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

18. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84194, 942½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$8,217.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

19. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84191, 300 4/5 bushel cartons of oranges and grapefruit for a total price of \$3,064.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$321.25 from the invoice price and paid \$2,743.25.

20. On or about December 9, 1984, complainant sold to respondent, set forth on invoice no. 84141, 745 4/5 bushel cartons of oranges and grapefruit for a total price of \$6,595.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$204.00 from the invoice price and paid \$6,391.00.

21. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84096-A, 460 4/5 bushel cartons of oranges and grapefruit for a total price of \$4,377.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

22. On or about December 10, 1984, complainant sold to respondent, set forth on invoice no. 84139, 780 4/5 bushel cartons of oranges and grapefruit for a total price of \$6,920.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

23. On or about December 12, 1984, complainant sold to respondent, set forth on invoice no. 84145, 26½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$257.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

24. On or about December 13, 1984, complainant sold to respondent, set forth on invoice no. 84138-A, 692 4/5 bushel cartons of or-

anges and grapefruit for a total price of \$6,625.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$450.00 from the invoice price and paid \$6,175.00.

25. On or about December 14, 1984, complainant sold to respondent, set forth on invoice no. 84083, 917½ 4/5 bushel cartons of oranges and grapefruit for a total price of \$9,185.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of \$1,032.50 from the invoice price and paid \$8,152.00.

26. All transactions set forth in paragraphs 3 through 25 were in interstate commerce. For the transactions and invoices set forth above, respondent paid a total of \$65,801.80 of the invoiced price of \$109,585.25, leaving a balance remaining unpaid of \$43,783.45.

27. A formal complaint was filed on May 17, 1985, which was within nine months of the accrual of the causes of action stated herein.

CONCLUSIONS

Complainant seeks to recover the full invoice price of the subject oranges and grapefruit less the amount respondent has paid to complainant. Respondent interposes as his defense to complainant's action that although he admits he owes \$26,930.50 to complainant, respondent has certain set-offs against said sum, which include a 25¢ commission on each box sold by respondent, a spoilage allowance, an advertising allowance, and a breach by complainant, which resulted in respondent having to go out and "cover" to meet his obligations, at a price greater than contracted for with complainant.

THE TERMS OF THE SALE

The evidence discloses that the terms of the sale were that respondent purchased the citrus in an f.o.b. sale, with ownership passing at the loading dock of complainant's packing house, where the citrus was loaded by respondent onto trucks procured by respondent, with payment to be made thirty (30) days after shipment. The parties agreed to a one percent (1%) spoilage "allowance" in which complainant would make some form of compensation to respondent if the product arrived at its destination point with greater than one percent spoilage provided prompt notice was given to complainant and some sort of verification could be made. This "spoilage allowance" was neither a credit to respondent, nor a rebate, set-off or reduction in price. It was a mutually agreed figure

below which respondent would accept spoilage loss and above which complainant would make compensation to respondent.

Respondent's attempt to incorporate terms of other contracts which complainant may have agreed to with other parties (Tr. 218-233) by inference because of their similarity with the contract respondent had with complainant, is unsuccessful. The terms contained in other contracts complainant negotiated with other parties are irrelevant to the terms agreed to by these two parties in their contract for the 1984-85 season.

A. The Purported Spoilage

An examination of the spoilage claims made by respondent, conveniently set forth at Exhibit 1B of the investigative report, indicates that respondent made seven deductions for alleged spoilage in the transactions at issue. The evidence discloses that only two out of the eleven lots had less than 1% spoilage. The remaining lots had 2.27, 3.09, 4.1, 5.52, and 15% spoilage. Yet in no case did respondent promptly inform complainant or request federal inspection. If such degree of spoilage did, in fact, exist, the cost of inspection would have been money well spent by respondent.

The contract provided for ownership passing at the point of shipment. Even if the sales to respondent had been "delivered" sales, the absence of a valid inspection is a fatal flaw in respondent's proof. In addition, the alleged documentation of such spoilage, is unpersuasive. One purported letter was undated (RX 2 p. 12) and the other letter was dated almost six months after the citrus was delivered. Both read as if they were requested by respondent long after the events, and the knowledge of the parties to the events in question, had passed. In addition, respondent presented no credible evidence that he gave complainant prompt or any other notice of the spoilage he eventually claimed. Testimonial evidence has often been discounted where a neutral inspection could have been obtained. *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); *S.J. Albert, Inc. v. Salvo*, 36 A.D. 240 (1977); *Edgar H. Graff, Jr. v. Chandler-Topic Co.*, 41 A.D. 1787 (1982). Therefore, the letters cannot receive any weight in this proceeding.

Complainant had the citrus inspected prior to releasing it to respondent for shipment. The inspection certificates were submitted with the complaint, are a part of the investigative report, and were introduced by complainant as exhibits at the hearing. At the point of the sale, the citrus met the grade and quality standards. Respondent presented no persuasive or credible evidence to show that the fruit's condition was otherwise on arrival. Respondent's deductions from the invoice price due to spoilage are disallowed.

B. The Purported Rebate

The largest amount claimed by respondent as set-off relates to the purported written contract giving respondent a twenty-five cents (25¢) per box commission. At issue is whether the alleged signature of complainant, Mr. Henry R. Clements, Jr., contained on this document, is the actual signature of Mr. Clements. Both parties presented their expert handwriting analysts. Both experts supported their analyses with reasoned explanations of their examination of the purported signature. After careful analysis of the testimony of both expert witnesses, as well as review of the questioned signature with the numerous examples of known signatures which were introduced into the record, we find that the questioned signature of "Henry T. Clements, Jr.", contained on the purported contract for a 25¢ per box rebate, was not proved to have been made by Mr. Clements. We come to this conclusion for the reasons which follow.

Initially, the language of the document is suspicious in nature. What purports to be an agreement or contract which, as the circumstances indicated, would have a value of in excess of \$13,000.00, was poorly drafted. Rather than "Clements Citrus Sales of Florida" hereby agrees to pay Greg Reeves 25¢ per box for fruit Greg Reeves Fund Raising Co. purchases and Clements Citrus ships for the 1984-85 season," the purported contract, just refers to "Clements", does not define the size of the box, and does not refer to the period involved. In addition, the purported contract was handwritten on stationery of one of respondent's company's "R Distribution Co." and ostensibly signed by the parties at the offices of complainant, rather than typed up by one of complainant's clerical employees. (Tr. 118)

As to the questioned signature itself, both handwriting experts raised relevant considerations regarding both the validity and invalidity of the signature. If one were to consider the testimony of just the handwriting experts, the decision would be a toss-up. However, having seen and heard the testimony of both Henry Clements and Greg Reeves, we find the testimony of Mr. Clements more credible, believable and persuasive. Therefore, for the reasons enumerated above, we find the signature to be a forgery. That being so, no contract existed between the parties regarding a 25¢ per box rebate, and such amount is not a set-off from the amount respondent owes complainant.

C. Respondent's Claim to Having Paid Various Invoices

Respondent claimed to have paid many of the invoices in dispute, and presented documentary evidence claiming payment for particu-

lar invoices. Although complainant was initially at a loss as to why his records and respondent's did not agree, the discrepancy disappeared when Ms. Carrera, complainant's office manager, testified to the procedure used in crediting payments made by Mr. Reeves. Ms. Carrera's testimony is most credible, and her explanation was most persuasive.

Ms. Carrera testified to the usual procedure followed by complainant's office upon the receipt of Mr. Reeve's check. Respondent usually paid a number of invoices with each check. When she received the check, the invoices the check was in payment for were attached to the check; she would credit respondent with the payment for the appropriate invoices, make a photocopy of the check and write the invoice number(s) and amount(s) of the invoice(s) that the check was in payment for on the sheet of paper containing the photocopy of the check. (CX 4, 5, and 6, p. 1). A comparison of these exhibits, with the check and invoice exhibits introduced by respondent, RX 1-3, indicates why the discrepancy regarding payment exists between the parties. A comparison of CX 4 with RX 1 shows that complainant's claim regarding the invoices for which the check was in payment, is reconciled with the total amount of the check *without* making a deduction for spoilage, while respondent's claim requires a reduction in price of one invoice, for alleged spoilage, to reconcile the check amount with the invoices. A similar comparison of CX 6 with RX 3 shows that the invoices respondent claims the check is in payment for *do not* even add up to the amount of the check. There is a difference of \$71.25.

Respondent explained the \$71.25 difference on the basis of a delivery of citrus products respondent purportedly made to a customer of complainant's "Youth Opportunity United", purported by respondent to be complainant's customer. (RX 5; Tr. 121-125). Such "explanation" is not credible. To begin with, the transaction occurred on or about December 16, 1984, but respondent didn't "deduct" it from his payment to complainant until his payment of February 6, 1985, more than 45 days later. In addition, the amount claimed for mileage, which equalled the \$71.25 amount, is suspect. Respondent's invoice and exhibit charges complainant for 57 miles of delivery at \$1.25 per mile. Yet the approximate mileage from Cincinnati to Dayton is 56 miles; from Dayton to Vandalia is 11 miles; and from Cincinnati to Florence, KY is approximately 12 miles, or a total of 79 miles. Respondent's invoice is off by 22 miles, or almost 50%. It is noted that no other combination of miles and price per mile will work. In addition, respondent's exhibits or proof of the \$71.25 was not contained in the documentation previously submitted as an attachment to this Answer or in the investigative

report. No evidence, other than the invoice prepared by respondent and respondent's testimony, indicates that "Youth Opportunity United" is complainant's customer. Respondent's Exhibit 5 appears to be fabricated evidence, to permit the respondent's check #1197 to reconcile with the invoices, in amount, with the invoices respondent claims it is for. It is interesting to note that all four of the invoices respondent claims check No. 1197 (RX 3 p. 1) was in payment for, are shown as unpaid by complainant. The failure to reconcile these amounts raises serious questions as to whether that check was in payment of those invoices. Respondent's testimony and evidence on this question is not credible. The testimony and evidence of Ms. Carrera, complainant's bookkeeper is. Respondent did not pay the invoices in dispute.

D. Respondent's Reductions in Price for Fruit Size

Respondent alleged that part of his reduction in price related to fruit not complying with size requirements. A comparison of the size information contained on the invoice, as well as an examination of the "Manifest Inspection Certificates and Bills of Ladings" or pack-out records, contained in CX 1 clearly indicates that the respondent's reductions in price as a result of size problems were unjustified. Although the signature of the authorized USDA inspector is not contained on the copies of such "Manifest Inspection Certificates" which are part of the record, [neither those attached to the Complaint, those of the report of investigation, nor those introduced at the hearing have them], the shipper's representative certified that the fruit had been inspected and no challenge to their accuracy was made. Such being the case, the validity and integrity of the information contained thereon is high. Respondent's reduction in price due to fruit size was unjustified.

E. Respondent's Claim that the Agreement Required Only Indian River Fruit

Respondent claimed that complainant agreed to supply only Indian River fruit. Complainant denied such claim, stating that the brand which was shipped to respondent, River Mist, was not an exclusive Indian River product. At the hearing Complainant's attorney graphically displayed the box the fruit was packed in, and no reference to the contents being Indian River fruit was contained thereon. This must be compared with respondent's testimony as well as with the statement contained on complainant's stationery that it was a "Fund Raising Development Specialists Serving Schools, Churches and Civic Organizations with *Quality Indian River Citrus*," (emphasis added) Complainant admitted in his testi-

mony, that the negotiations with respondent were for the purchase and sale of Indian River Fruit (Tr. 43). Complainant's own stationary supports respondent's claim. Had respondent presented evidence to substantiate the difference in cost between Indian River and Interior citrus fruit for this period, such award of a set-off could have been granted to the extent that complainant shipped interior fruit rather than the contracted Indian River fruit.

The only evidence on the issue of the price differential between Indian River and Interior citrus was the testimony of complainant, who stated that there was no difference on price (Tr. 45). Mr. Gallo, testifying on behalf of respondent, stated that interior oranges are cheaper than Indian River (Tr. 233), but provided no price difference for the period and varieties in question. The failure of respondent to present such evidence and prove the amount of damages, precludes the respondent from asserting his right to recover such damages. In addition, the Manifest Inspection Certificates, referred to above, were of two types, one that clearly indicated that Indian River citrus was involved by such designation being printed on the invoice, and one that had no indication of Indian River fruit printed thereon. Examination of the information contained on the bottom of the non "Indian River" manifest discloses the total number of standard boxes involved in the manifest, broken down by type; i.e. grapefruit, oranges and tangerines. Immediately above those figures is an entry of designation of "Area 1—Area 2", and the numbers set forth to either side of those areas equals the total number of "standard boxes" involved. All the "Indian River" manifests indicate that the fruit involved therein came from Area 2. Mr. Clements testified that Area 1 meant Interior fruit and Area 2 was Indian River fruit (Tr. 45). However, there was no evidence that respondent received a copy of the invoice. The record indicates, by an examination of those manifests, that the substantial majority of the fruit purchased by respondent from complainant was Indian River Fruit.

F. The Advertising Allowance

Respondent claims as a further set-off a \$1500.00 advertising allowance which complainant agreed to. The evidence presented by both parties was self-serving and contradictory. Respondent did not prove such advertising allowance being agreed upon by a preponderance of the evidence. Evidence of neither side is of greater weight. Therefore, the claim for a set-off of the amount of the advertising allowance, \$1500.00, is denied.

G. Respondent's Other Claims and Setoffs

In respondent's answer, respondent alleged the complainant had agreed to provide gift boxes to respondent for an agreed price; that complainant failed to provide the necessary citrus for such boxes which caused respondent to locate said citrus from other sources and "cover" at a higher price; and that such action by complainant caused an additional loss to respondent of approximately \$9,000.00. Respondent presented no evidence regarding this matter, so it is hereby denied.

Respondent did, however, present evidence that citrus purchased by respondent was sent to fill an order of complainant's, for a customer complainant had in Ohio. (RX 5; Tr. 121) As discussed in Section A of this Decision, such explanation is not credible. That respondent did not raise this fact previously in his answer, nor at the time of the investigation, since it is not in the investigative report, makes the claim unpersuasive, and is hereby denied.

Having raised several set-offs to the amount owing to complainant respondent has the burden of proving them by a preponderance of the evidence. *The Grower-Shipper Potato Company v. Southwestern Potato Co.*, 28 A.D. 511 (1969); *Branix Trucking v. Cumberland Produce Co., Inc.*, 41 A.D. 1814 (1982); *Harry Wolfe v. Mendelson-Zeller Co.*, 34 A.D. 690 (1975)

The preponderance of the evidence is not necessarily controlled by the number of witnesses or the number of exhibits. Rather the preponderance or weight of the evidence is governed by the credibility of the witnesses. *Richardson on Evidence* Fourth Edition, Section 179. At the hearing, the Presiding Officer had an opportunity to observe the demeanor, under oath, of all the witnesses, including the complainant and respondent, on direct and cross examination. He is of the opinion that the greater weight should be attached to the testimony of the complainant and his witnesses. In the circumstances, it is concluded that respondent has *not* sustained his burden of proof by a preponderance of the evidence. *Great Western Food Distributors v. Brannan*, 201 F.2d 476 (7th Cir. 1953); *United States ex rel Ohm v. Perkins*, 79 F.2d 533 (2d Cir. 1935).

Therefore, as a result of respondent's failure to pay for the invoices at issue, as well as respondent's failure to prove the setoffs claimed, respondent is liable for the contract price remaining unpaid of \$43,783.45. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be rewarded, with interest. Since neither party has submitted a request for fees and expenses, such right to the award is hereby waived.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$43,783.45, with interest thereon at the rate of thirteen percent per annum from February 1, 1985, until paid.

Copies of this order shall be served on the parties.

RITCLO PRODUCE, INC. v. JOHN LIVACICH PRODUCE, INC. and/or
LARRY ELMER, INC. PACA Docket No. 2-6476. Decided November 6, 1986.

FOB Sale—Inspection—Failure to pay—Reparation awarded.

Respondent agreed to be liable for all payments due in regards to purchase of produce and failed to pay complainant in full. Respondent was ordered to pay complainant, as reparation, \$53,166.40, with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid. Respondent shall also pay to complainant, as additional reparation for fees and expenses incurred, the sum of \$5,948.55, with interest thereon at the rate of thirteen percent per annum from the date of this order, until paid.

George S. Whitten, presiding officer.

James A. Soto, Nogales, Arizona, for complainant.

Patricia J. Rynn, Newport Beach, California, for respondent (Livacich)
Respondent (Elmer), *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant requested an award of reparation against respondents in the amount of \$53,166.40 in connection with the shipment in interstate commerce of eight truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondents which filed a joint answer thereto, in which respondent John Livacich Produce, Inc. denied any liability to complainant, and respondent Larry Elmer, Inc., admitted liability to complainant in the amount of \$30,733.40, and denied liability for the balance claimed. On March 2, 1984, an order requiring payment of the undisputed amount was issued against respondent Larry Elmer Inc. On April 27, 1984, after being advised that respondent Larry Elmer Inc. had filed a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11

U.S.C. §§ 1101-1174), and in view of the automatic stay provisions of 11 U.S.C. § 362, an order was issued holding this proceeding in abeyance as against Larry Elmer, Inc., until receipt by this Department of proper notification that the Chapter XI proceeding has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

The amount claimed in the formal complaint exceeds \$15,000.00, and an oral hearing was requested in the answer. An oral hearing was held August 15 and 16, 1985, in San Bernardino, California. Two witnesses testified on behalf of complainant, and four witnesses testified on behalf of respondent. In addition four depositions previously taken were received in evidence following the hearing. Both parties filed briefs and claims for fees and expenses.

FINDINGS OF FACT

1. Complainant, Ritclo Produce, Inc., is a corporation whose address is P.O. Box 794, Nogales, Arizona.

2. Respondent, John Livacich Produce, Inc., is a corporation whose address is P.O. Box 5519, San Bernardino, California. At the time of the transactions involved herein this respondent was licensed under the Act. Respondent Larry Elmer, Inc., is a corporation whose address is P.O. Box 45586, Los Angeles, California. At the time of the transactions involved herein this respondent was licensed under the Act. This proceeding has been stayed as against respondent Larry Elmer, Inc.

3. In the latter part of February, 1983, Edward Stoller, Jr., general manager of Ritclo Produce (hereafter Ritclo), received a telephone call from Joe Saccamano, a partner of Larry Elmer, Inc. (hereafter Elmer) in the purchase and sale of (principally) tomatoes. Mr. Saccamano proposed that Elmer purchase tomatoes from Ritclo. Edward Stoller, Jr., after running a credit check on Elmer, informed Mr. Saccamano that, although he would like to sell produce to Elmer, he could not extend Elmer any credit. Saccamano informed Stoller, Jr., that he would have Larry Elmer contact Stoller, Jr., about the possibility of working together with John Livacich Produce, Inc. (hereinafter Livacich) on the purchase and sale of produce. On the same day Stoller Jr., received a call from Larry Elmer, who asked whether complainant would sell to Elmer if Livacich could be involved. Stoller Jr., responded that he would have no problems with such an arrangement. Later that day Stoller Jr. and John Livacich, president of respondent Livacich, talked by phone, and agreed that Livacich would guarantee pay-

ment on merchandise sold by Ritclo to Elmer, and would take invoicing on such merchandise.

4. Between March 14, 1983, and April 24, 1983, complainant sold and shipped to Elmer or Elmer's customers eight truckloads of tomatoes, and invoiced Livacich on each of the eight truckloads. John Livacich received each of the invoices and forwarded each of them unopened to Elmer. The total agreed invoice cost of the eight truckloads of tomatoes was \$53,166.40. Stoller, Jr., made several contacts with Livacich by telephone during the month of May requesting payment on the eight tomato invoices. Edward Stoller III, salesman with complainant, talked by telephone with Teddy D. Elmer, office controller for Elmer, during the latter part of May, and requested payment on the invoices. On June 8, 1983, Stoller Jr., wrote to Livacich reviewing their agreement and requesting payment of the entire balance of \$53,166.40. In the latter part of June, Stoller III talked by telephone with Ted Elmer and Al Brasile, salesmen for Elmer, at which time the parties went over each of the invoices. Ted Elmer and Al Brasile admitted full liability on the first six invoices, but stated that there were quality problems with the tomatoes in the last two invoices. Stoller III, asked if federal inspections had been made on the two loads of tomatoes in question, and was told that no inspections were made. Stoller III, then informed Ted Elmer and Al Brasile that without federal inspections, and without notifying complainant much sooner, he had no authority to grant any kind of adjustment. Ted Elmer indicated a willingness to pay only \$954.10 on the next to the last invoice (original amount \$11,214.30), and \$1,081.00 on the last invoice (original amount of \$12,142.55). Ted Elmer also indicated that they had a "dump certificate" on the two loads. Stoller III, ended the conversation by telling Ted Elmer that he had no authority to grant any kind of adjustment, and that Ted Elmer should send the money owed on the first six invoices, and the paper work on the remaining two.

5. On July 15, 1983, Ted Elmer wrote the following letter to Ritclo Produce:

Atn: Eddie

Enclosed is our check in the amount of \$31,844.55 in settlement of our account in full. Following is summary of your account. As you know this merchandise was purchased by Larry Elmer, Inc. with John Livacich Produce Co., Inc. guaranteeing payment.

We are paying as follows:

Inv. # 1475		\$17,269.20	
Inv. # 1490		2,732.40	
Inv. # 1560		(4,065.00)	Credit
Inv. # 1560		7,609.55	
Inv. # 1564		6,996.00	
Inv. # 1645		558.90	
Inv. # 1646		5,488.20	
Inv. # 1658		4,432.20	
Inv. # 1706		1,102.20	
Inv. # 1707		13,465.25	
Inv. # 2008		4,762.80	
Inv. # 2139*		954.10	
Inv. # 2176*		<u>1,081.00</u>	
		\$62,386.80	
Payment 4/1/83	Less	2,732.40	Our Check # 1535
Payment 4/20/83	Less	<u>27,809.75</u>	Our Check # 1592
		\$31,844.65	

*Sold on open account as agreed between Eddie and Joe Saccamano

Their (sic) was a total of 2,471 cartons of which 1605 were dumped. (a copy of the dumping certificate is attached)

The return of the balance of 866 return an average price of \$2.35 per box.

Sincerely,

Ted D. Elmer
(Controller)

cc John Livacich Produce Co., Inc.

6. On July 19, 1983, Edward Stoller Jr., wrote the following letter to John Livacich Produce, Inc.:

Mr. John Livacich:

This deal with Larry Elmer has really been a nightmare. John. I have never consented for Joe Saccamano to handle anything for our account. He did call me a couple of times that he was having a hard time moving the merchandise. . .

John, both of you and I have not been unfair in our trading practices, for either you or I would not be trading members, or have been in Business Character Awards Listings.

John, once more I am asking for you to honor your commitment to us, as was first agreed. You took the billing and what arrangements you had with Larry Elmer is your business. The amount owed is \$53,166.40, Larry Elmer did send a check for \$31,844.65 but stated in writing, that payment was in full, which we will not accept. I will send you Mr. Elmer's check so that you can make other arrangements. Please call us where to send check and please mail yours by return mail.

Sincerely yours,

Edward Stoller, Jr.

7. The formal complaint was filed on August 25, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Livacich asserts that complainant agreed to a settlement on the last two loads of tomatoes following arrival of such tomatoes. This respondent contends that since a check was tendered in the amount of \$31,844.65 based upon the alleged settlement agreement, and such check was rejected by complainant, the liability of Livacich ended at that point. Livacich also contends that "because there was no clear understanding between Livacich and Ritclo with respect to the number of shipments involved and the duration of the credit obligation, no contract existed between the parties" and that "complainant's failure to mitigate the loss makes imposition of an award against Livacich inequitable".

In an effort to show that there was an agreement between the parties following delivery of the tomatoes for a settlement on the last two loads, respondent Livacich offered the testimony of Teddy D. Elmer, Larry Elmer, and Al Brasile, all of whom claimed to have been involved in some phase of the alleged settlement negotiations. However, complainant did not submit any testimony from Joe Saccamano, the person who allegedly first elicited an agreement from Ritclo to settle on the last two loads. Complainant's testimony consisted of that of Edward Stoller Jr., and Edward Stoller III, the only two parties who entered into any negotiations on behalf of complainant. Complainant asserted that it was the policy of their company to require federal inspections whenever there was an adjustment for quality. Both Stollers testified that at no point did they ever agree to any adjustment in price on the last two loads of tomatoes, nor did they agree to such loads being handled on an "open" basis. Respondent urges that a transaction in regard to bell peppers, which occurred between complainant and Elmer

prior to the sale of the eight loads of tomatoes, demonstrates that complainant would agree to adjustments without a federal inspection having been made. However, complainant maintained that the adjustment which was admittedly made in regard to the bell pepper shipment was an adjustment for market decline. We also note that an important distinction between the bell pepper transaction and the disputed tomato transactions exists in the fact that complainant issued a prompt credit memo following its making of an adjustment in regard to the bell peppers, but issued no credit memo in regard to the disputed tomato transactions. In fact, the record is devoid of any prompt documentation indicating in any way that there was an adjustment in regard to the last two loads of tomatoes. The earliest written reference to any such adjustment in the record is contained in the July 15, 1983, letter from Ted Elmer which states that the two loads were "sold on open account as agreed between Eddie and Joe Saccamano".

In looking at the specific testimony of Livacich's three principal witnesses we find that the actual words which these witnesses said were used in regard to the alleged settlement negotiations fall short of indicating an agreement on the part of Ritclo to an adjustment, or to the two loads being handled on an open basis. For instance Al Brasile, who was directly associated with Joe Saccamano in the tomato transactions, stated that following the arrival of the next to the last truck Joe Saccamano called and talked with one of the Eddies, had a heated argument, and that both parties hung up. Brasile states that shortly thereafter there was a second conversation to which Brasile was a party "and, to my best recollection, Eddie told Joe, he said, do the best you can to move these. I know what the merchandise is supposed to be. Get the best price you can." Later Brasile again stated as follows:

Q. And were you on the telephone the second time?

A. Yes, I was.

Q. And what was said during that conversation?

A. We were told to get the best price we could and to move the product, keep it moving.

We have held many times that such phrases as "do the best you can", "the buyer should work it out", "handle best possible", and "handle to best advantage", do not amount to authorization to handle a load on an open basis or on account. See *Relan Produce Farms v. Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979); *Barkley v. Ifsco, Inc.*, 31 Agric. Dec. 279 (1972); *Frank Gaglione & Son v.*

Theron Hooker Co., 30 Agric. Dec. 528 (1971); and *Ralph Samsel v. L. Gillarde Sons Co.*, 19 Agric. Dec. 374 (1960).

All three of respondent's principal witnesses testified concerning a conversation that was had with one of the Eddie Stollers during the middle or latter part of June at the place of business of Elmer in Los Angeles. Each of respondent's principal witnesses stated that they were present for the conversation, and were on the line together at least during parts of the conversation. Mr. Brasile stated that although there was no inspection on either of the two disputed invoices, nor was any confirming memo ever sent concerning the two invoices, notations were made on respondent's copy of one of the invoices indicating a settlement figure. Mr. Brasile's testimony was as follows:

Q. The notation where it starts with return average \$2.35 per Al Brasile, do you know whose notation that is?

A. I believe that is Larry Elmer's.

Q. Do you recall when that was placed on there?

A. I believe this was placed on there the time that we had a conversation and I went down to Los Angeles. I believe that is when it was done.

Q. It is your recollection, then, that that notation was placed on the invoice at that meeting in Los Angeles?

A. Yes.

Q. Is that the same time the phone call occurred with the elder Eddie at Ritclo?

A. Yes.

Q. The same day?

A. The same day.

Q. Were these notations placed there during the course of the conversation or prior to the conversation?

A. During the conversation.

Q. Looking up above there there are some numbers that are written in, do you know—first of all, do you know who placed those numbers on there?

A. I believe Larry Elmer did. He had the invoice.

Q. Do you know when those numbers were placed on there?

A. That day.

Q. Was that also during this conversation with elder Eddie?

A. Yes, it was.

Q. And you were on the line when this conversation was taking place?

A. Yes, I was.

Q. What do those numbers mean?

A. That means an adjusted price.

Q. Were those the adjusted prices per box?

A. Yes.

Q. Of each item?

A. Yes, it was.

Q. And that is what was agreed upon on that date?

A. Yes, it was.

During the course of this testimony the Presiding Officer interrupted, and asked the witness "could you tell us again how you know it was the elder Eddie?" To this the witness responded: "It sounded like him. I have had numerous conversations with him over the phone." Later Mr. Brasile, while continuing his testimony on the same subject stated as follows:

Q. Why don't you tell me exactly what you recall being said during that conversation?

A. I recall, to the best of my ability I can think of, I got Eddie on the phone, elder Eddie. We specifically started with invoice No. 2139. I said we want to get this straightened out with you, as Joe had prior to this. Larry jumped in on the line and we started going down and making deductions.

Q. And Eddie agreed to all of these deductions?

A. Well, they were back and forth on the deductions.

Q. There was some negotiation that went on to arrive at these figures?

A. Yes.

Q. What else was said, that you recall?

A. Well, on both invoices they had done the same thing and they come to an agreement on payment.

Q. At that time Larry Elmer, yourself and elder Eddie were on the phone?

A. Yes. And then—I take that back. I believe I got off the phone and Ted Elmer got on and I think Larry hung up too, with Eddie and Ted Elmer got on the phone. I believe that's what happened, later.

Q. Do you know what was said between Ted Elmer and Eddie?

A. No, I do not. I was not in that room.

Q. And basically it is your understanding that what was agreed to was that the Invoice No. 2139 in the original amount of \$11,214.30 was adjusted down to \$954.10?

A. I don't know. That I don't know.

Q. Weren't you on the telephone when——

A. (Interrupting) I was on the telephone, but they were reading, they were going by the 11.85 down to 2.35, that's what I recall the most. I don't recall the end figure. I believe that was done with Ted.

Q. And the same thing was done on Invoice No. 2176?

A. Yes.

Q. Didn't you say that you heard them agree to this?

A. These prices on the side.

Q. You didn't hear them agree to the 954, just the prices on the side?

A. Right.

Later Larry Elmer testified concerning the same conversation as follows:

Q. All right, now, do you know when your brother wrote on these invoices?

A. Yes, it was sometime in June. This was when we closed out the files. I had Al fly down because John had called me and requested that I make the payment.

Q. That is John Livacich?

A. Yes. . .

* * * * *

I called Al and told him to bring all his files and paper work down, to fly down. And we closed out the files, and I put Al on because I didn't want to have any problem. I said, O.K., lets call up and settle the open invoices, as were agreed upon, and he says, O.K. So, we called up Ritclo, asked for Eddie, Sr., and he wasn't there. I talked to, I guess, his son. . .

* * * * *

Q. How many loads did you discuss with Ritelo, do you recall?

A. Well, it was basically the eight open invoices. You know, we agreed on all the invoices except for the last two.

Q. So, you went through, invoice by invoice, over the telephone, did you on this day?

A. Yes.

Q. The eight invoices?

A. Eddie did not agree with the way that the last two invoices were, because he asked for an inspection. I said we didn't have an inspection because Joe and Eddie had worked it out and there was no inspection needed. It was an open invoice—it was an open load.

Q. And did he respond?

A. He said, "Well, if that's the agreement, then, get off the payment". And he asked for dumping certificates because he was astonished at the amounts that were dumped. . .

Teddy Elmer also testified in the regard to this conversation that it was initiated by Al Brasile and that after negotiations between Brasile and the representative of Ritclo he was asked to get on the telephone to verify the figures:

. . . He asked me to pick up the phone. I picked up the phone and I verified the adjustments that we had made on their invoices with Eddie, and he said to send the paper work and that along with the check.

* * * * *

Q. Which Eddie is this that you are referring to?

A. I was told it was Eddie, Jr., the reason for that being—I assumed—that I didn't know the senior Eddie was a Junior and this was a III, so I was talking with the younger Eddie.

* * * * *

Q. Who initiated this call?

A. Al Brasile.

Q. Was there anyone else present in the room?

A. My brother.

Q. And that is Larry?

A. Yes.

Q. What did Al say?

A. He, basically, was telling them of the problem on these particular invoices and of the problem that the majority of the produce had to be dumped and of the return, that the quality, you know, was very bad, and that these are the adjustments and this would be the payment that would be made. I got on the phone to verify it and I went over it exactly with what these figures were and we agreed to \$31,844.65, which was, as far as I knew, Eddie had agreed of the new balance, and that was the amount that we were to pay to completely liquidate the tomatoes with Ritclo, completely pay them off.

Taking this testimony as a whole it can be interpreted in the following manner: First, it is claimed that immediately following the

arrival of the tomatoes a protest was made to Ritclo, and Ritclo responded that Elmer was to move the produce as quickly as possible, and do the best they could with it. This may have been taken to mean that the two tomato invoices were to be viewed henceforth as "open." Later in June when the younger Eddie was called to reach a final settlement he was told that there had been a prior agreement that the two loads were to be handled on an open account, and he responded "well, if that's the agreement, then, get off the payment". This was interpreted by Teddy Elmer to mean that the amount for which payment was then to be made was a settlement figure. However, the testimony of Larry Elmer indicates that the younger Eddie was not in agreement that there should be a settlement at that point, but was merely stating that if there had been a prior agreement Elmer should pay on that basis. Whether this is the correct interpretation to be put on the testimony of respondent's principal witnesses, we do not know. However, the resolution of this issue is to be found in the very basic proposition that it was respondent's responsibility to prove by a preponderance of the evidence that a settlement in regard to the two loads was in fact entered into. As we have stated before, there was no documentation confirming such a settlement, and we conclude that respondent has not proven by a preponderance of the evidence that there was such a settlement.

Respondent Livacich's contention that because there was no clear understanding between Livacich and Ritclo with respect to the number of shipments involved and the duration of the credit obligation, no contract existed between the parties, is without merit. Mr. Livacich testified at the hearing that at the time the agreement was entered into there was no discussion regarding how many shipments were to be involved, and that he did not have any approximate idea of the number of shipments that would be shipped subject to his guarantee. Mr. Livacich received invoices on all of the eight shipments in question and chose of his own violation not to open the letters containing the invoices but to send them on to Elmer. The fact that these letters were sent to Elmer shows that Mr. Livacich knew what they contained and indeed, there is no contention to the contrary. There was obviously an on-going guarantee as to each of the invoices, and Mr. Livacich's consent to the continuation of such guarantee is obvious.

Respondent Livacich's contention that "complainant's failure to mitigate the loss makes imposition of an award against Livacich inequitable" is also without merit. Respondent states, first, that Ritclo failed to communicate with Livacich on a regular basis concerning Elmer's payment practices, adjustments or other problems

U.S. GATEWAYS, INC. *v.* FINEST FRUIT, INC. PACA Docket No. 2-6947. Decided November 6, 1986.

Consignment sale—Failure to properly account and remit—Failure to obtain dumping certificate.

Where consignee's records failed to disclose full disposition of consigned produce, investigator's use of average sales price for the missing cartons was only course available. Respondent shall pay to complainant, as reparation, \$2,808.40 plus interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,808.40 in connection with the shipment of four loads of produce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. In addition, respondent was served with a copy of the formal complaint, filed an answer thereto in which it denied any further liability to complainant.

The amount claimed in the formal complainant does not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party filed one. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, U.S. Gateways, Inc., is a corporation whose mailing address is 531 Chestnut Street, Cedarhurst, New York 11516.

2. Respondent, Finest Fruit, Inc., is a corporation whose mailing address is 260-265 New York City Terminal Market, Bronx, New York 10474. At all material times, respondent was licensed under the Act.

3. During the period March 23, 1984 through April 9, 1984, respondent received, on consignment, from complainant, four loads of produce, to wit; on March 23, 1984—258 cartons of peppers and 232 cartons of okra which were identified as lot number 320; on March

31, 1984—800 Galia melons which were assigned lot number 361; on April 3, 1984—1,733 Galia melons which were assigned lot number 373; and on April 9, 1984—1,328 Galia melons which were assigned lot number 418. In addition, respondent's receiving records disclosed that it had other lots of okra, peppers, and melons on hand during the same period of time as that in which it was selling complainant's commodities.

4. On or about April 12, 1984, the respondent remitted to the complainant for these commodities submitting checks to it totalling \$7,587.02. At the same time, it provided complainant with accounts of sales for these items which may be summarized as follows:

		Peppers	
4	@	\$10.00	\$40.00
5	@	8.00	40.00
4	@	7.50	30.00
21	@	7.00	147.00
46	@	6.50	299.00
11	@	6.00	66.00
85	@	5.00	425.00
2	@	4.00	8.00
12	@	2.00	24.00
25	@	1.50	37.50
20	@	1.25	25.00
23	@	1.00	23.00
<u>258</u>			<u>1164 50</u>

		Okra	
3	@	\$5.00	\$15.00
100	@	1.00	100.00
129	dumped		0
			<u>115.00</u>
		Total	\$1,279.50

Less Expenses:		
USDA Inspection		\$42.00
Terminal charge		9.80
Handling charge		73.50
Commission		<u>191.92</u>
		<u>(317.22)</u>
		\$962.28

		Melons	
10	@	\$6.50	\$65.00
39	@	6.00	234.00
50	@	5.50	275.00
480	@	5.00	2,400.00

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670 @	4.75	3,182.50	
51 @	4.50	229.50	
61 @	4.00	244.00	
5 @	3.50	17.50	
55 @	3.25	178.75	
138 @	3.00	414.00	
30 @	2.75	82.50	
5 @	2.50	12.50	
80 @	2.00	160.00	
225 @	1.50	337.50	
437 @	1.00	437.00	
323 @	.75	242.25	
108 @	.50	54.00	
4 lost re-pack		0	
<u>1,090</u> dumped		<u>0</u>	
3,861			\$8,566.00
Less Expenses:			
Terminal charge	77.22		
Handling charge	579.15		(1,041.26)
Commission	1,284.89		
			<u>\$6,624.74</u>
			\$7,587.02

5. An informal complaint was received by the Department on May 7, 1984, which was within nine months after the causes of action herein accrued.

6. During the period February 19, 1985 through March 1, 1985, the matter was the subject of a personal investigation by Mr. James E. Bright, an investigator employed by the PACA branch of the Fruit and Vegetable Division, Agricultural Marketing Service United States Department of Agriculture. Mr. Bright's investigation indicated that respondent received the produce as indicated above, and that it accounted for the produce also as indicated above. The investigation further indicated that respondent's sales tickets were sequentially numbered and filed by date with charge and cash tickets filed separately within each date. However, the investigation also disclosed that respondent did not record identifying lot numbers on the sales tickets. Therefore, in order to complete his investigation, Mr. Bright had to locate sales of all peppers and okra between March 23, 1984, and April 2, 1984, and sales of all Galia melons between April 2, 1984, and April 10, 1984 i.e., during the time periods when the lots of produce at issue would have been

for sale. A review of those records by Mr. Bright did not indicate the complete disposition of all of the produce. That is, although the respondent reported to the complainant that 1,090 cartons of melons had been dumped, Mr. Bright was not able to locate any documentation supporting this claim in the respondent's files. Therefore, Mr. Bright included the value of the missing cartons at the average sales price in the account of sales which he compiled from the respondent's records with regard to the Galia melons. In this regard, it should be noted that Mr. Bright's review of respondent's records indicated that respondent sold 2,964 cartons of melons rather than 2,771 as it reported to complainant. Additionally, Mr. Bright's review of respondent's sales records reflected sales of more peppers and okra than were contained in the subject shipments. These extra cartons were deducted from his accounts of sales at the average sales price. The audit accounts of sales compiled by Mr. Bright is as follows:

		Peppers	
1	@	\$22.00	\$22.00
3	@	10.00	30.00
4	@	8.00	32.00
4	@	7.50	30.00
20	@	7.00	140.00
6	@	6.50	39.00
46	@	6.00	276.00
101	@	5.00	505.00
2	@	4.00	8.00
3	@	3.00	9.00
17	@	2.00	34.00
25	@	1.50	37.50
20	@	1.25	25.00
28	@	1.00	28.00
<hr/>		<hr/>	
275			\$1,210.50
(-)	@ ASP 4.4018		74.83
17			<hr/>
258	Adj. Gross Proceeds		\$1,185.67

		Okra	
2	@	\$8.00	\$16.00
1	@	7.00	7.00
10	@	6.00	60.00
49	@	5.00	245.00
50	@	4.00	200.00
10	@	3.50	35.00
36	@	3.00	108.00
24	@	2.00	48.00
125	@	1.00	125.00
<hr/>		<hr/>	
307			844.00

(-) @ ASP 2,7491	(206.18)
<u>75</u>	
232 Adj. Gross Proceeds	\$637.82
490 Ctns. Total Gross Proceeds	\$1,773.44
Less Expenses	
Inspection U.S.D.A.	\$42.00
Term. Charge @ 1½/ctn	7.35
Handling Charge @.15	73.50
Commission @15%	<u>266.02</u>
Total Expenses	\$388.87
Net Proceeds Due	\$1,384.62
Net Proceeds Reported and Paid	<u>962.28</u>
Net Proceeds Underreported and Underpaid	\$422.34

Melons		
10 @	\$6.50	\$ 65.00
34 @	6.00	204.00
50 @	5.50	275.00
480 @	5.00	2,400.00
670 @	4.75	3,182.50
51 @	4.50	229.50
61 @	4.00	244.00
5 @	\$3.50	17.50
55 @	3.25	178.75
138 @	3.00	414.00
30 @	2.75	82.50
5 @	2.50	12.50
65 @	2.00	130.00
225 @	1.50	337.50
447 @	1.00	447.00
586 @	.75	439.50
108 @	.50	54.00
<u>4 @ lost re-pack</u>		<u>0</u>
2,964		\$8,713.25
+ 897 @ ASP 2.94		<u>+ 2,637.18</u>
3,861 Adj. Gross Prods.		\$11,350.43

Less Expenses:	
Terminal charge @ 1½¢	57.92
Handling charge @.15	579.15
Commission @15%	<u>1,702.56</u>

Total Expenses	(\$2,339.63)
Net Proceeds Due	9,010.80
Net Proceeds Reported and Paid	<u>(6,624.74)</u>
Net Proceeds Underreported and Underpaid	<u>\$2,386.06</u>
	\$2,808.40

7. As respondent denied being obligated to the complainant as indicated by the Department's audit of its records, on May 31, 1985, the complainant filed its formal complaint.

CONCLUSIONS

The focus for decision in this matter is upon the respondent's failure to provide any evidence that it dumped 1,090 cartons of Galia melons. The regulations issued by the Department have, for about the last 30 years, required that a consignee, before dumping in excess of 5% percent of a consignment, must obtain documentation supporting its claim that the produce needed to be dumped, i.e., a federal inspection certificate, before dumping the produce unless it has written permission from the consignor prior to sending out its account of sales permitting it to avoid the necessity of having such an inspection done. *See* 7 CFR §§ 46.22, 46.23. In the instant case, it appears as if the respondent did not obtain any written permission from the complainant to enable it to avoid the necessity of having the produce federally inspected and, apparently, it did not obtain such an inspection. Moreover, despite the regulations' requirement that a consignee maintain some sort of evidence that the produce was actually dumped, the respondent has provided no documentation showing that the melons were in fact dumped. Furthermore, while the respondent claimed that 1,090 cartons were dumped, the department's investigator was able to locate sales tickets reflecting the sale of some of these cartons and only was unable to document sales of 897 cartons, a difference of 193 cartons. Because of the failure of respondent's records to actually reflect that these items were dumped and because of the discrepancy between respondent's claim that it dumped 1,090 cartons of melons while the investigator found that its records reflected sales of 193 of these cartons, we find that the investigator's audit correctly reflects respondent's obligation to complainant, and that the respondent failed to truly and correctly account to the complainant in the amount of \$2,808.40 with regard to the subject shipment of produce. Respondent's failure to truly and correctly account and remit to the complainant in this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$2,808.40 plus interest in the amount of 13% percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DOVEX IMPORTS, INC. d/b/a UNIFRUTTI OF AMERICA v. NATIONAL PRODUCE DISTRIBUTORS, INC. and/or CENTRAL PRODUCE EL JIBARITO, INC. PACA Docket No. 2-7036. Decided November 6, 1986.

Jurisdiction—Burden of Proof—Sufficiency of evidence—Default judgment.

Where the complainant alleges failure to pay for two shipments of grapes, it has the burden to prove jurisdiction, i.e. the interstate character of the transactions, by a preponderance of the evidence. The respondent's failure to answer the complaint constitutes an admission of the facts alleged. The order is against the defaulting respondent.

Sharlene W. Lassiter, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). The complainant filed a timely complaint in which it sought an award of reparation against respondents in the amount of \$40,007.75 in connection with two transactions of grapes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served on each respondent. Respondent Central Produce El Jibarito, Inc., filed an answer thereto, denying liability. Respondent National Produce Distributors, Inc., did not file an answer to the formal complaint and therefore is in default under section 47.8(c) of the Rules of Practice (7 CFR § 47.8(c)).

Although, the amount of damages claimed in the formal complaint exceeds \$15,000, the parties waived oral hearing. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable herein. Pursuant to such procedure, the parties had the opportunity to submit additional evidence in support of their respective positions by means of verified statements. Complainant did not file an opening statement

and neither of the respondents filed an answering statement. None of the parties filed a brief.

FINDINGS OF FACT

1. Complainant, Dovex Imports, Inc., doing business as Unifrutti of America, hereinafter Dovex, is a corporation whose mailing address is P.O. Box 2300, Wenatchee, Washington 98801.

2. Respondent National Produce Distributors, Inc., hereinafter respondent National, is a corporation whose mailing address is 489 New York City Terminal Market, Bronx, New York 10474. At the time of the transactions involved in this proceeding, respondent National operated subject to license under the Act.

3. Respondent Central Produce El Jibarito, Inc., hereinafter El Jibarito, is a corporation whose mailing address is P.O. Box ZZ, Caparra Heights, Kennedy Avenue, Room 3.9, Monterey Dev., Puerto Nuevo, Puerto Rico 00922. At the time of the transactions involved in this proceeding, El Jibarito was not licensed under the Act.

4. On or about May 9, 1985, in the course of interstate commerce, Dovex sold and shipped to National and a corporation known as Central Produce, Inc., Bronx, New York, hereinafter Central-New York, 2112 lugs of grapes, at a total f.o.b. price of \$20,592.00

5. On or about May 20, 1985, in the course of interstate commerce, Dovex sold and shipped to National and Central-New York, 2099 lugs of grapes at a total f.o.b. price of \$19,415.75.

6. Respondent National and Central-New York received and accepted both shipments of grapes in Bronx, New York.

7. Respondent National and Central-New York have yet to pay Dovex for the two shipments of grapes.

8. Dovex filed a formal complaint on October 9, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

This proceeding involves the purchase of two shipments of grapes from Dovex by at least one of the respondents. Dovex alleges that National and El Jibarito, jointly and severally, purchased two shipments of grapes on or about May 9 and 20, 1985, for which the total purchase price, \$40,007.75, remains due. First, we will discuss the allegations against El Jibarito.

As the moving party, the complainant has the burden to prove by a preponderance of the evidence the affirmative allegations of its complaint. *New York v. Sandler*, 32 Agric. Dec. 702, 705 (1973). The first issue is jurisdiction. Dovex alleges that El Jibarito was not licensed under the Act but operated subject to the licensing requirements of the Act. (7 U.S.C. § 499d(a)). In this regard, Dovex

must establish the interstate character of the transaction, that El Jibarito of Puerto Rico purchased, received and shipped two shipments of grapes in New York, shipped by Dovex to Washington. *Jebavy-Sorenson v. Lynn Foods*, 32 Agric. Dec. (1973); See *Kellam v. Virginia Tomato Corp.*, 29 Agric. Dec. (1970).

The documents proffered by Dovex do not constitute sufficient evidence to establish that El Jibarito accepted the grapes in New York. Dovex proffers only an invoice and a bill of lading for the shipment. Each invoice is addressed to Central-New York Produce Company, Inc. of lading for the 2099 lug shipment contains two signatures of persons who received the shipment in New York. The bill of lading for the 2112 lug shipment contains a signature without further explanation. The invoices and the bills of lading are sufficient evidence to show the interstate character of the transaction but not that El Jibarito accepted the grapes in Dovex. First, the invoices are addressed to El Jibarito. Second, the invoices do not establish whether the addressee, Central-New York, was an authorized agent of El Jibarito in New York through which El Jibarito purchased, received, or accepted the grape shipments from Washington. Third, neither the invoices nor the bills of lading establish a legal relationship between El Jibarito and the individuals who signed the bills of lading. Thus, there is insufficient evidence of interstate transactions by El Jibarito in this case. Therefore, we conclude that Dovex did not meet its burden of proving that El Jibarito operated in interstate commerce subject to the Act and that the Secretary had jurisdiction over El Jibarito. The complaint against El Jibarito must be dismissed for lack of jurisdiction.

The second issue is the default of respondent National Produce Distributors, Inc. to file an answer to the formal complaint constitutes an admission of the facts alleged in the complaint as provided in section 47.8(c) of the Rules of Practice (7 C.F.R. § 47.8(c)). Respondent National's failure to pay to Dovex the purchase price of the two shipments of grapes is in violation of section 2 of the Act (7 U.S.C. 499b). Accordingly, Dovex must be awarded reparation in the amount of \$40,007.75, with interest.

ORDER

The complaint against Central Produce El Jibarito, Inc. is dismissed.

Within 30 days from the date of this Order, respondent National Produce Distributors, Inc., shall pay to Dovex, as reparation, \$40,007.75, with interest thereon at the rate of 13% per annum from June 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

INTERNATIONAL A. G., INC. v. MACK C. DEMPSEY d/b/a MACK DEMPSEY Co. PACA Docket No. 2-7073. Decided November 6, 1986.

Burden of proof—Sufficiency of evidence—Liability for failure to pay.

Respondent is liable to the complainant for the contract purchase price, where complainant satisfies its burden to prove the price term of the oral contract by a preponderance of the evidence with an invoice, and respondent fails to prove that the price term is incorrect under the same standard.

Shariene W. Lassiter, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$6,234.64 in connection with a transaction involving melons in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto admitting liability for \$3,340.50 of the purchase price and denying liability to the complainant for the remainder.

Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Although both parties were given an opportunity to file a brief, neither party did so.

FINDING OF FACT

1. Complainant, International A. G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142.

2. Respondent, Mack C. Dempsey is an individual doing business as Mack Dempsey Co., whose mailing address is P.O. Box 1229, 758 Main Street, Gardenville, Alabama 35071. At the time of the trans-

action involved in this proceeding, respondent was licensed under the Act.

3. On January 17, 1985, in the course of interstate commerce, complainant sold and shipped to respondent, from Miami, Florida to Gardenville, Alabama, one truckload of melons consisting of cantaloupes, honeydews and watermelons, pursuant to an oral contract negotiated by A.J. Regoli, Jr., for the complainant and Gary Syracuse for the respondent, at a total agreed f.o.b. price of \$6,231.61.

4. Respondent received and accepted the truckload of melons at Gardenville, Alabama.

5. Payment for the truckload of melons was due within 10 days from January 17, 1985, the date of the invoice. Respondent received the invoice without complaint.

6. On March 12, 1986, an order requiring payment of the undisputed amount of the purchase price, \$3,340.50, was issued and served on both parties.

7. Complainant filed a formal complaint on November 7, 1985. It also filed an informal complaint on September 25, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This proceeding involves respondent's purchase of one truckload of mixed melons from complainant. The only issue for discussion concerns the agreed upon total purchase price for the load of melons.

Complainant alleges that the parties agreed to a total purchase price of \$6,234.64 for the load, while respondent submits that the agreed upon total price is only \$3,340.50. Complainant, as the moving party, has the burden of proving the essential elements of the allegations in his complaint by a preponderance of the evidence. *New York v. Sandler*, 32 Agric. Dec. 702, 705 (1973). The evidence submitted by the complainant consists of an invoice indicating that the total purchase price of the mixed melons was \$6,234.64. The invoice does not represent the contract between the parties but is evidence of the agreed upon terms of the oral contract between the parties when, as here, it is received without objection by the buyer. *Casey v. Albanese*, 31 Agric. Dec. 311, 317 (1972).

The respondent claims that the total price which appears on the invoice is incorrect. Yet, respondent has submitted no substantive evidence whatsoever to support his assertion. Rather, respondent proffers a copy of the complainant's invoice which contains handwritten alterations to the prices per crate and the total purchase price. The respondent does not proffer evidence to indicate who

made the changes on his copy of the invoice, 2) when the price changes were made, 3) whether respondent communicated with the complainant, or attempted to communicate, that he did not agree with the prices indicated on the invoice, 4) whether the complainant agreed to any changes in the price, or 5) whether respondent took any steps to reject the truckload because of a conflict with the prices on the invoice. Therefore, we hold that the complainant, by submission of its copy of the invoice, has carried its burden of proving that the purchase price for the truckload of melons was \$6,234.64.

The respondent here, having accepted the truckload of melons, is liable to the complainant for the contract purchase price as indicated by the invoice provided by the complainant. *J.R. Simplot Co. v. Red L. Foods Corp.*, 17 Agric. Dec. 384, 390 (1958).

The order requiring payment of the undisputed amount of the purchase price, \$3,840.50, issued on March 12, 1986, remains in effect. In addition, respondent is liable to the complainant for the remaining \$2,894.14 of the purchase price.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$2,894.14, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

WEST FOODS, INC. v. WEINSTEIN PRODUCE SALES, INC. PACA Docket
No. 2-6896. Decided November 10, 1986.

FOB Sale—Failure to rebut evidence—Modification of Contract—Complaint dismissed.

Respondent admitted purchase of 5 trucklots of mushrooms but was found, on the basis of its un rebutted denial, not to have purchased a sixth trucklot. Respondent's handling of the mushrooms received was found to have been in accord with contra modification agreed to by complainant after the arrival of the produce. The complaint was dismissed.

George S. Whitten, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$4,706.75 in connection with the shipment in interstate commerce of six trucklots of fresh mushrooms.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant in part, but admitting liability in the total amount of \$2,683.51. On September 27, 1985, an order requiring payment of the undisputed amount was issued in complainant's favor against respondent. Respondent's liability for the remaining disputed amount was left for determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had issued. See 7 U.S.C. 499g(a).

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, West Foods, Inc., is a corporation whose address is P.O. Box 3500, Salinas, California.

2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P.O. Box 7364, Boise, Idaho. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about the following dates complainant sold and shipped to respondent five trucklots of fresh mushrooms as follows:

Date	In-voice No.	Amount
10-03-84	29827	\$940.50
10-16-84	30991	1,095.50
10-26-84	32047	1,143.50
11-08-84	33291	740.75
11-21-84	34488	582.75
		<u>\$4,518.00</u>
	TOTAL	

4. After receipt of each of four of the shipments of mushrooms respondent contacted complainant, and complained of poor condition in the mushrooms. Complainant told respondent no inspection was necessary, and authorized respondent to rework the mushrooms. Respondent reworked each lot of mushrooms, dumped a portion of each, and accounted to complainant for the remainder on the basis of original contract price less a \$1.00 per carton charge for repacking, and less freight on the cartons dumped. Respondent paid for the shipment of October 16, 1984, in the original contract amount. The total amount which respondent has paid on all five transactions is \$2,683.51.

5. The formal complaint was filed on February 25, 1985, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase prices alleged to be due on six trucklots of fresh mushrooms allegedly sold by complainant to respondent. Respondent admits the purchase and receipt of five of the trucklots, but denies that a trucklot allegedly shipped on October 4, 1984, having a total invoice price of \$188.75, was ordered or received by respondent. This denial by respondent was made during the informal stages of this proceeding, and was again repeated in respondent's answer. Complainant has not rebutted or in any way commented on respondent's denial. We conclude that complainant has not adequately proved that respondent purchased and received the alleged shipment of October 4, 1984.

Respondent has admitted purchase and receipt of the remaining five trucklots of fresh mushrooms, and has admitted liability to complainant for the full contract amount in regard to the shipment of October 16, 1984, having a total invoice price of \$1,095.50. As to the remaining four shipments respondent maintains that it notified complainant immediately upon receipt of each such shipment, complained about the condition of the mushrooms and was granted authority by an employee of complainant named "Steve" to rework the mushrooms, and account to complainant without securing a

federal inspection. Complainant has not replied to these allegations by respondent although it had ample opportunity to do so. Respondent accounted to complainant for the full purchase price of all cartons of mushrooms not dumped, less freight on the cartons dumped, and a modest fee for resorting. Complainant did not take issue with the method in which these accountings were done. We conclude from all of the evidence that respondent was authorized by a representative of complainant to deal with the mushrooms in the manner reflected by its accountings. We also conclude that no amount remains due from respondent to complainant. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. v. OTAY PACKING CO. PACA Docket
No. 2-6978. Decided November 10, 1986.

Admission of liability—Payment—Complaint dismissed.

Respondent purchased on an FOB basis and accepted 9 trucklots of tomatoes from complainant. Respondent was ordered to pay for 8 of the trucklots on the basis of its admission, in its answer, of liability to complainant. Respondent denied liability for the remaining lot and submitted evidence that it had previously paid complainant for such tomatoes. Complainant admitted the payment, and the complaint was dismissed.

George S. Whitten, presiding officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$25,023.00 in connection with the shipment in interstate commerce of nine truck lots of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability in the amount of \$23,970.00, and denying liability to complainant for the remaining amount. On November 20, 1985, an

order was issued on the basis of respondent's admission requiring that respondent pay complainant \$23,970.00 as an undisputed amount.

The amount claimed in the formal complaint exceeds \$15,000.00, however, the parties have waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between October 4, and October 16, 1984, complainant sold and shipped to respondent 9 trucklots of fresh tomatoes, of various sizes and prices, having a total invoice cost of \$25,023.00, f.o.b.

4. Respondent received and accepted all of the tomatoes on arrival. Respondent has paid complainant the full f.o.b. invoice cost in the amount of \$1,053.00 for the load of tomatoes sold and shipped on October 4, 1984. Respondent has been ordered to pay complainant as an undisputed amount the full purchase price of the remaining 8 loads of tomatoes in the amount of \$23,970.00.

5. An informal complaint was filed on February 13, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent admitted liability to complainant in its answer for the full purchase price of the 8 trucklots of tomatoes shipped October 6, through October 16, 1984, and a total f.o.b. invoice price of \$23,970.00. Respondent was ordered to pay complainant this amount on November 20, 1985.

In its answer respondent denied owing complainant any amount on the first lot of tomatoes shipped October 4, 1984, and having a total invoice value of \$1,053.00. Respondent stated that this amount had already been paid, and submitted a copy of a cancelled check dated May 17, 1985, made out to complainant in the amount \$1,053.00. The copy of the stub relative to this check references the

invoice number applicable to the October 4, 1984, shipment of tomatoes. Complainant, in its opening statement admits that respondent has paid in full for the October 4, 1984, shipment of tomatoes. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

A. LEVY & J. ZENTNER CO. v. GARDEN STATE FARMS, INC. PACA
Docket No. 2-7310. Decided November 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on April 28, 1986. Complainant seeks to recover \$4,550.10, which amount is alleged to be the purchase price for cantaloupes sold to and accepted by respondent on or about August 2, 1985. Respondent filed an answer to the complaint on August 18, 1986. In this answer, respondent admitted owing complainant \$3,211.10 of the \$4,550.10 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$3,211.10. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

PHOENIX VEGETABLE DISTRIBUTORS v. FARO VITALE & SONS, INC.
PACA Docket No. 2-7038. Decided November 14, 1986.

FOB Sale—Contract modification— Mishandling by consignee—Reparation awarded.

Respondent sustained its burden of proving that it was authorized by complainant to handle part of the load on consignment. However, respondent mishandled the produce and is liable to complainant for the net proceeds which sale of the produce should have brought. Respondent is liable for the full contract price for the portion of the load not handled on consignment.

Andrew Stanton, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

James V. Billanca, Detroit, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,720.50 in connection with the sale and shipment of a trucklot of mixed produce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability, and asserted a counterclaim for \$1,354.79. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Phoenix Vegetable Distributors, is a corporation whose address is 1932 West McDowell Road, Phoenix, Arizona. At

the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Faro Vitale & Sons, Inc., is a corporation whose address is 2820 Rivard Street, Detroit, Michigan. At the time of the transaction involved in the complaint, respondent was licensed under the Act.

3. On approximately March 23, 1985, complainant sold to respondent a trucklot of mixed produce consisting of 360 cartons of mustard greens at \$4.15 per carton, 220 cartons of turnip greens at \$4.15 per carton, 433 cartons of collard greens at \$4.15 per carton, 50 sacks of turnips at \$5.00 per sack, and 47 cartons of spinach at \$4.65 per carton, plus \$48.00 for top ice, for a total of \$4,720.50, f.o.b., payment within 30 days from the date of acceptance. The contract was negotiated by a broker, Ralph Jarson, Phoenix, Arizona, with whom both parties exclusively communicated. The broker issued a confirmation of sale on March 26, 1985, which contained the agreed upon contract terms, and sent a copy to each party.

4. The mixed produce was loaded onto a truck operated by D. C. F & B, Inc., provided by a truck broker, Agra Transport Service, Inc., Phoenix, Arizona, and on March 23, 1985, was shipped in interstate commerce to respondent's place of business. Upon arrival, on or before March 28, 1985, the mixed produce was unloaded and accepted.

5. On March 28, 1985, at 11:55 a.m. respondent had the mustard, turnip and collard greens federally inspected, resulting in the following, in relevant part:

WHERE INSPECTED	Applicant's Warehouse Floor
Products Inspected:	Bunched MUSTARD, TURNIP OR COLLARD Greens in separate cartons printed "Garnish brand, Phoenix Vegetable Distributors, Phoenix, Arizona, 2 dozen." Applicant States: 360 cartons Mustard Greens, 220 cartons of Turnip Greens, 433 cartons of Collard Greens.
Condition of Load:	Stacked on pallets at above location.
Condition of Pack:	Fairly well filled, good amount of pack ice.
Temperature of Product:	In various cartons: 37°F to 38°F

Condition:

Mustard Greens: Fresh and green color.
No decay. Turnip Greens: Fresh and mostly green color. Damage by yellow leaves from 4 to 9 bunches per carton, average 24%. No decay. Collard Greens: Fresh and mostly green color. Damage by numerous dark brown to black spots affecting 3 to 6 leaves from 1 to 6 bunches per crate, average 14%. No decay.

6. Upon receiving the inspection results, respondent's employee, Sam Pizzo, contacted the broker, who notified complainant's employee, Eric Soper. Mr. Soper authorized respondent to handle the turnip and collard greens on consignment for complainant's account. The broker conveyed this information to respondent.

7. Respondent sold a portion of the turnip and collard greens and prepared accounts of sales, which it sent to complainant. The account of sales for the turnip greens showed 12 cartons sold on March 29, 1985, for \$3.00 per carton, two on April 1, 1985 for \$4.00 per carton, and 30 on April 2, 1985, for \$3.00 per carton, for a total of \$134.00 for the 35 cartons sold. The remaining 176 cartons were shown as dumped. Regarding the collard greens, the account of sales showed five cartons sold on March 29, 1985, at \$5.00 per carton, two on April 1, 1985, at \$2.00 per carton, one on April 2, 1985, for \$6.50 per carton, 20 on April 2, 1985, for \$3.00 per carton, and 14 on April 6, 1985, for \$7.00 per carton, for a total of \$187.50 for the 42 cartons sold. The remaining 391 cartons were shown as dumped.

8. On March 28, 1985, respondent paid freight to D. C. F. and B. Inc., in the amount of \$1,810.85 and commission to Agra Transport Service, Inc., in the amount of \$162.90, for a total of \$1,973.75.

9. On August 12, 1985, the broker wrote a letter to the Department which reads as follows, in relevant part:

Upon arrival at Faro Vitale, inspection were [sic] taken and reported to Eric Soper of Phoenix Vegetable Distributors. Sam Pizzo of Vitale were very distressed over the quality of the Collards and Turnip Greens which failed inspection. Eric Soper told me to have Vitale handle these rejected greens on consignment and to remit a full accounting of sales. To my knowledge this was done.

10. A formal complaint was filed on July 26, 1985, which was within nine months from when the cause of action herein accrued.

A timely counterclaim dealing with the subject matter of the complaint was filed on October 16, 1985.

CONCLUSIONS

Respondent contends that after receiving the trucklot of mixed produce shipped by complainant, it obtained a federal inspection which disclosed poor condition. Respondent alleges having been told by the broker that it had consulted with complainant, who had authorized respondent to sell the merchandise on consignment for complainant's account. Respondent claims that after deducting from the proceeds of its sales the costs of freight, inspection, commission, storage and dumping, complainant is liable for \$1,354.79, which respondent asserts as a counterclaim.

It is clear that respondent accepted the turnips and spinach, as respondent admits receiving them but does not allege having given notice of rejection to the broker or complainant. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). It is also evident that respondent accepted the greens, as the March 28, 1985, inspection report states that the products inspected, the mustard, turnip, and collard greens, were located on the warehouse floor (Finding of Fact 5). We have held that the unloading of a commodity is an exercise of dominion over it, and constitutes acceptance. *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Having accepted the produce, respondent became liable for the contract price, less damages resulting from any breach of warranty. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, *supra*. Respondent also has the burden of proving its claim that the contract terms were changed to a consignment. *Joe Phillips, Inc. v. G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983).

The report of investigation contains a letter, dated August 12, 1985, from the broker to the Department which states that complainant authorized a change in the contract terms to a consignment for only the turnip and collard greens. Respondent has thus sustained its burden of proving a change in the contract terms with respect to these commodities. There is no evidence in the record of any change in contract terms for the mustard greens, turnips, or spinach, nor is there any evidence that these commodities were in breach of warranty. Therefore, respondent is liable for the full contract price of \$1,494.00 for the mustard greens, \$250.00 for the turnips, and \$218.55 for the spinach, for a total of \$1,962.55.

Complainant argues that respondent mishandled the consignment sales of the turnip and collard greens, as respondent's ac-

counts of sale show that on April 25, 1985, respondent had sold only 44 cartons of turnip greens for \$134.00, while dumping the remaining 176 cartons, and sold only 42 cartons of collard greens for \$187.50, while dumping the remaining 391 cartons. Respondent contends that the greens were very difficult to move because of their poor condition and the presence of competing product in the Detroit area. However, the March 28, 1985, federal inspection shows that neither commodity was greatly damaged. There was no decay, and the turnip greens exhibited only an average of 24% yellow leaves and the collard greens only an average of 14% black spots. The extent of the damage found by the inspection is not sufficient to justify the large percentage of cartons dumped. If the greens were as difficult to move as respondent asserts, respondent should have kept complainant fully informed of the situation to enable complainant to reconsign the greens or sell them itself. *Jobb Packing Co., Inc. v. Peter Condakes Company*, 30 Agric. Dec. 1076 (1971). However, there is no evidence that respondent made any attempt to do so. It is our conclusion that based on the evidence in the record, there is justification for dumping at most one-third of the turnip greens and none of the collard greens. Respondent is therefore liable for the value of the cartons which should not have been dumped based on the average sales price of the cartons which were sold. For the turnip greens, 44 cartons sold for \$134.00, resulting in an average sales price of \$3.05 per carton. Out of the 196 cartons dumped, two thirds, or 147 cartons, should have been sold, which should have brought proceeds of \$448.35. For the collard greens, 42 cartons sold for \$187.50, resulting in an average sales price of \$4.46. Therefore, all 433 cartons in the load should have sold for \$1,931.18. The 653 cartons of consigned greens should thus have brought gross proceeds of \$2,379.53. Respondent is entitled to deduct commission of 15%, or \$356.93. Respondent may also deduct the portion of its freight payment attributable to the 653 consigned cartons. Respondent has provided evidence that it paid shipping charges of \$1,973.75 for all 1,110 cartons originally purchased from complainant. The portion of these charges which respondent may deduct is \$1,161.13. An additional cost of shipping for which respondent is liable is the portion of the \$48.00 for top ice provided by complainant which can be attributed to the 457 cartons sold, or \$19.76. None of the other deductions alleged by respondent for dumping and storage are supported by the evidence, and the cost of inspection is not a permissible deduction.

In summary, respondent is liable to complainant for \$1,962.55 for the mustard greens, turnips and spinach, \$2,379.53 for the consigned turnips and collard greens, and \$19.76 for top ice, totalling

\$4,361.84. Respondent is entitled to deduct from this sum the \$1,161.13 which it paid for freight for the consigned greens, and \$356.93 in commission, resulting in \$2,843.78. There is no merit to respondent's counterclaim, and it must be dismissed. Respondent is liable to complainant for \$2,843.78, and its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,843.78, with interest thereon at the rate of 13% per annum from May 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

SEABOARD PRODUCE DISTRIBUTORS, INC. v. INTERNATIONAL A. G.
INC. PACA Docket No. 2-7274. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$6,292.00 in connection with a shipment of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto. Such answer did not admit or deny its indebtedness to complainant. Respondent was therefore sent a letter advising it to show cause why an appropriate order should not be entered against it. Respondent was further advised in such letter that a failure to respond would result in the issuance of an order on admission of liability. Respondent has failed to respond. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Seaboard Produce Distributors, Inc., is a corporation whose address is P. O. Box 486, Camarillo, California 93011. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$6,292.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$6,292.00, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

BORDER FRUIT CO., INC. v. FRUIT DISTRIBUTING CORP. PACA Docket
No. 2-6825. Decided November 21, 1986.

FOB Sale—Inspection—Accounting—Protection agreement—Reparation awarded. Complainant sold five lots of mangoes to respondent and such mangoes were accepted on arrival. As to four of the lots, respondent failed to subject mangoes to inspection by a neutral party and therefore failed to establish breach on the part of the complainant. Respondent also failed to submit proof of damages. As to the remaining lot of mangoes, respondent failed to prove that it was granted full protection. Adjustment in price was allowed on basis of protection for market decline which complainant admittedly granted to respondent.

George S. Whitten, presiding officer.

Robert F. Barnes, Hidalgo, Texas, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$17,497.00 in connection with the shipment in interstate commerce of five lots of mangoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which defaulted in the filing of an answer. Prior to the issuance of a default order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR § 47.25(e)). On May 6, 1985, respondent's motion was granted, respondent's default was set aside, and a proposed answer previously submitted by respondent was ordered filed and served upon complainant. Respondent's answer denied liability to complainant in

the amounts claimed, and admitted liability in the amount of \$6,450.00 in connection with the last shipment of mangoes. On July 2, 1985, an order was issued requiring payment of the \$6,450.00 as an undisputed amount.

Although the amount claimed in the formal complaint exceeds \$15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Border Fruit Co., Inc., is a corporation whose address is P.O. Box 1229, Hidalgo, Texas.

2. Respondent, Fruit Distributing Corp., is a corporation whose address is 746 South Central Avenue, Room 230, Los Angeles, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about April 30, 1984, complainant sold and shipped to respondent's customer 300 cartons of mangoes at a total price of \$2,325.00, f.o.b. Respondent has paid complainant \$1,425.00 in connection with this shipment of mangoes which leaves a balance still due and owing of \$900.00.

4. On or about May 3, 1984, complainant shipped on one truck, to three of respondent's customers in Los Angeles, California, three lots of mangoes under separate invoices as follows: Invoice No. 6297, 1,000 cartons at a total price of \$6,350.00 f.o.b.; Invoice No. 6298, 400 cartons at a total price of \$2,869.00 f.o.b.; Invoice No. 6299, 507 cartons at a total price of \$3,429.75 f.o.b. Complainant has paid respondent a total of \$8,276.75 toward the purchase price of this truckload of mangoes.

5. On or about May 11, 1984, complainant sold and shipped to respondent one truckload containing 2,300 cartons of mangoes at a total price for the truckload of \$12,225.00 f.o.b. Complainant granted respondent protection for market decline as to this load. Respondent's admission of liability in the amount of \$6,450.00 related to this truckload of mangoes.

6. The formal complaint was filed on September 27, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

In regard to the first two shipments of mangoes (Findings of Fact 3 and 4) respondent admits that such mangoes were sold on a f.o.b. basis. However, respondent alleges that when the mangoes arrived at the places of business of respondent's customers in Los Angeles, some of the cartons were crushed due to faulty carton construction and the mangoes were green and immature. In consequence of these alleged problems respondent has paid complainant less than the original f.o.b. purchase price for these mangoes. There are two problems with respondent's defense in regard to complainant's claim for the balance of the purchase price as to the mangoes covered by Findings of Fact 3 and 4. First, respondent did not have any inspection made of these mangoes by a neutral third party. Such inspections are necessary to establish both the fact and the percentage of defects claimed in perishable produce. See *Mutual Vegetable Sales v. Select Distributors*, 38 Agric. Dec. 1359 (1979). While we infer that respondent claims that all of the mangoes were immature, there is no allegation in the record as to what percentage of the mangoes are claimed to have been damaged by crushed containers. The second problem with respondent's defense in regard to the mangoes covered by Findings of Fact 3 and 4 is that respondent has furnished us with no accountings covering the resale of such mangoes. Without such accountings we would be unable to award damages to respondent even had we been able to find a breach of contract on the part of complainant. See *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979).

In regard to the last shipment of mangoes respondent claims that it was granted full protection by complainant and then it equates this with a consignment sale. However, a protection agreement is not the same thing as a consignment. See *Dave Walsh Co., Inc. v. Liberty Fruit Co., Inc.*, 38 Agric. Dec. 533 (1979). A protection agreement has reference to a base price, and concerns goods that are sold, whereas in the case of a consignment there is no sale of the produce, and the shipper at all times retains title to the produce. In this case complainant strongly maintains that the produce was sold on a f.o.b. basis, and that protection was granted to respondent only for market decline. We find on the basis of all of the evidence of record that respondent has not shown that it was granted full protection relative to the load of produce shipped on May 11, 1984, and that the protection granted was only for market decline.

A personal investigation was conducted by an employee of this Department relative to the transactions which are the subject of the dispute between complainant and respondent. This investiga-

tion revealed, on the basis of applicable Market News Service reports, that there was no market decline relative to the 1,500 size 16 or the 200 size 18 mangoes included in the shipment of May 11. However such investigation disclosed that there was a decline relative to the 200 size 12 and 400 size 14 mangoes, and that such market decline justified a protection allowance in the total amount of \$550.00. We conclude that respondent should be allowed \$550.00 as an adjustment to the original \$12,225.00 purchase price of the mangoes shipped on May 11, 1984.

The load of mangoes shipped on April 4, 1984, had a total purchase price of \$2,325.00. Respondent has paid complainant \$1,425.00 of this amount which leaves a balance still due and owing of \$900.00. The total f.o.b. prices of the three lots of mangoes shipped on May 3, 1984, was \$12,648.75. Of this amount respondent has already paid complainant \$8,276.75, which leaves a balance still due and owing of \$4,372.00. The original purchase price of the mangoes shipped on May 11, 1984, was \$12,255.00. We have previously found that an adjustment to this price in the amount of \$550.00 should be allowed to respondent leaving a balance of \$11,675.00. Of this amount respondent has already been ordered to pay \$6,450.00, which leaves a balance still due as to this shipment of \$5,225.00. The total which we have found to be still due and owing from respondent to complainant in this proceeding is \$10,497.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$10,497.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BYRD PRODUCE COMPANY v. LOWELL V. SCHY d/b/a LOWELL SCHY
BROKERAGE. PACA Docket No. 2-7145. Decided November 21,
1986.

FOB Sale—Brokers duties and responsibilities—Damages—Reparation awarded.
Where broker failed to negotiate a binding damage he is liable to shipper for difference between contract price and the amount actually received.

Edward M. Silverstein, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$1,512.00 in connection with one transaction in foreign commerce involving broccoli, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim against complainant seeking payment of brokerage in the amount of \$201.60 in connection with the same transaction made the subject of the complaint.

As the amount in dispute is less than \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. Also, the parties were given the opportunity to file further evidence by way of verified statements. Complainant filed a verified opening statement. Neither party filed a brief.

FINDING OF FACT

1. Complainant, Byrd Produce Company, is a corporation whose mailing address is P.O. Box 965, Guadalupe, California 98484.

2. Respondent, Lowell V. Schy is an individual, doing business as Lowell Schy Brokerage, whose mailing address is 7568 North Valentine, Fresno, California 93711.

3. At all material times complainant and respondent were licensed under the Act.

4. On January 6, 1985, respondent contacted complainant seeking to purchase 1008 cartons of broccoli, size 18, on behalf of his client Lenson Celery, Toronto, Ontario, Canada. The parties agreed that complainant would ship such a lot of broccoli to Lenson Celery with the latter to pay complainant \$5.50 per carton (\$5,544.00), plus 85¢ per carton for cooling and palletizing (\$856.80), 20¢ per carton for brokerage (\$201.60), \$77.50 for top ice, and \$22.50 for a Ryan recording thermometer, for a total agreed f.o.b. price of \$6,702.40.

Complainant was to pay respondent \$201.60 as brokerage. Later that same day, complainant discovered that it was not able to harvest enough broccoli from its own fields to satisfy the contractual agreement. Mr. Chad Smith, complainant's General Manager and Sales Manager, telephoned respondent with that information, and was informed by respondent that he did not care whose broccoli complainant shipped. Complainant, therefore, purchased the broccoli from another shipper whose brand name was "Uncle Miltie," and, after notification to respondent of this purchase, shipped the broccoli to Lenson Celery on January 7, 1986. Respondent issued a broker's memorandum of sale also on January 7, 1986, indicating that the complainant agreed to ship "Uncle Miltie" brand broccoli to Lenson Celery. Presumably, the memorandum was sent to, and received by, both complainant and Lenson Celery.

5. Lenson Celery received and accepted the "Uncle Miltie" brand broccoli shipped by complainant. No inspection was made of the broccoli after it was received and, as there was no complaint as to its quality by Lenson Celery or respondent, it appears to have arrived in good order. However, Lenson Celery has paid complainant only \$5,190.40, or \$1.50 per carton less than was agreed upon between complainant and respondent. Lenson Celery refused to pay the full agreed purchase price because it allegedly was not satisfied with the brand of broccoli shipped by complainant. Respondent was aware, before the broccoli was shipped, that complainant was shipping "Uncle Miltie" brand broccoli and expressed no concern regarding its shipment.

6. Complainant has not paid respondent the \$201.60 brokerage owed the latter for this transaction.

7. The informal complaint was filed on June 14, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In this reparation proceeding the sole issue is whether the respondent, a broker, negotiated a binding contract between complainant and Lenson Celery for the 1008 cartons of broccoli. It appears from the record that Lenson Celery had a strong dislike for "Uncle Miltie" brand broccoli. The record does not reflect any cause for such dislike. However, the record is clear that Lenson Celery refused to pay the full \$5.50 contract price, despite the good arrival of the broccoli, solely because of the brand of broccoli shipped rather than because of any grade or condition defect in existence. Were Lenson Celery subject to the Act and were it the respondent, under these facts, we would have no qualms about ordering it to pay the complainant the balance due. *Van Buren County*

Fruit Exch. v. B. F. Roberts Farms, 28 Agric. Dec. 1365 (1969). As it is not, we must decide whether respondent has any liability for the failure of Lenson Celery to pay the full contract price for the broccoli. Respondent knew that complainant was shipping "Uncle Miltie" brand broccoli. He should have known that Lenson Celery would not accept this brand at the contract price.¹ His failure, under these circumstances to notify complainant not to ship the "Uncle Miltie" brand broccoli was therefore a failure to perform the specifications and duties of a broker in violation of section 2 of the Act, and caused complainant to be damaged in the amount of \$1,512.00. *Salinas v. Wholesale, et al.*, 31 Agric. Dec. 1453 (1972).

Respondent claims that complainant has not paid it the \$210.60 brokerage due for this shipment. Complainant does not deny this. Accordingly, we hold that complainant is obligated to respondent in this amount.

On the basis of the record contained herein, we find that respondent is obligated to complainant in the amount of \$1,310.40 (\$1,512.00 - \$201.60), and that his failure to pay complainant this amount is a violation of the Act for which reparation plus interest ought to be awarded.

In view of the above, the respondent's counterclaim ought to be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, \$1,310.40 plus interest at the rate of 18% per annum from February 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

¹ If he did not know whether or not Lenson Celery would accept an alternative brand, under the circumstances, respondent should have checked with Lenson Celery to determine whether the "Uncle Miltie" brand broccoli complainant proposed to ship was acceptable or whether any broccoli other than that grown by complainant was acceptable before agreeing to allow complainant to ship any alternative brand. Had he done so, perhaps the filing of this action could have been avoided.

SUN WORLD INTERNATIONAL, INC. v. INTERNATIONAL A. G., Inc.
PACA Docket No. 2-7283. Decided November 21, 1986.

Andrew Stanton, presiding officer.

Complainant, *pro se*.

C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$7,720.20 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, apparently admitting the material allegations of the complaint, including the indebtedness claimed by complainant. On September 18, 1986, the Department sent a letter to respondent giving respondent 10 days from its receipt thereof to show cause why a reparation order should not immediately be issued against it, based on respondent's apparent admission of liability. Respondent has submitted a letter, but it does not deal with the issue of the apparent admission of liability, and thus is insufficient to prevent the immediate issuance of a reparation order against respondent. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Sun World International, Inc., is a corporation whose address is P. O. Box 9110, Bakersfield, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 28rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$7,720.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$7,720.20, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served upon the parties.

COX TOMATO COMPANY, INC. v. SIDNEY WOLFE d/b/a WILDEROM TOMATO HOUSE. PACA Docket No. 2-7319. Decided November 21, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on May 5, 1986. Complainant seeks to recover \$28,965.80, which amount is alleged to be the purchase price for tomatoes sold to and accepted by respondent between October 21 and December 8, 1985. Respondent filed an answer to the complaint on August 22, 1986. In this answer, respondent admitted owing complainant \$23,290.00 of the \$28,965.70 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$23,290.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

**HARRY SHAFFER, INC. v. VAN SOLKEMA FARMS, INC. PACA Docket
No. 2-6881. Decided November 24, 1986.****Burden of proof—Reparation awarded.**

Where shipper fails to prove it had a contractual agreement with respondent, it is not entitled to award of damages, but where buyer fails to prove disposition of produce accepted on price after sale basis, it is liable for agreed price for each carton in lot.

Edward M. Silverstein, presiding officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). Three timely complaints were filed in which complainant seeks an award of reparation against respondent in the total amount of \$3,864.00, in connection with the shipment of three loads of produce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. In addition, respondent was served with a copy of each of the three individual complaints filed by complainant, and filed an answer to each of them in each of which it denied any further liability to complainant.

As the total amount claimed in the three formal complaints did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements, but neither party did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Harry Shaffer, Inc., is a corporation whose mailing address is P.O. Box 1272, Parkersburg, West Virginia 26102.

2. Respondent, Van Solkema Farms, Inc., is a corporation whose mailing address is P.O. Box 308, Byron Center, Michigan 49315. At all material times, respondent was licensed under the Act.

3. On or about July 31, 1984, respondent was contacted by Mr. John Mankin, an employee of complainant, and asked to handle 324 cartons of cantaloupes which had been rejected by complainant's original customer, Tony-Lin Produce, Inc., 2701 Russel Street, Detroit, Michigan 48207, on a price after sale basis. Respondent ar-

ranged for the cantaloupes to be handled by J. A. Besteman Co. of Grand Rapids, Michigan. On or about August 28, 1984, the parties agreed on a price of \$7.00 per carton, or a total of \$2,268. Respondent, claiming that 127 of the 324 cartons were unmerchantable, paid complainant for only 197 cartons at \$7.00 per carton (\$1,379.00). The disposition of the remaining 127 cartons of cantaloupes is unknown.

4. On or about August 2, 1984, respondent was again contacted by complainant's employee, Mr. John Mankin. This time, respondent was asked to unload 175 cartons, which previously had been rejected by at least one of complainant's customers, from a truck and to "dispose of them even if they have to be dumped." After looking at the shipment, respondent concluded that the cantaloupes were not salable and, with complainant's permission, had it dumped. At no time did respondent accept this lot of cantaloupe.

5. On or about August 5, 1984, respondent purchased 500 cartons of eggplant from complainant at a total agreed f.o.b. price of \$5,250.00, or \$10.50 per carton. Complainant had paid \$8.50 per carton for the eggplant, or \$4,250.00. Respondent has remitted to complainant at a rate of \$7.00 per carton, or \$3,500.00.

6. Each of the three complaints involved herein was filed on April 11, 1985, which was within nine months after the causes of action therein accrued.

CONCLUSIONS

In reparation matters under the Act, complainants have the burden of proving, by a preponderance of the evidence, the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by it. *New York v. Sandler*, 32 Agric. Dec. 702 (1973). In a case involving a shipper as a complainant, once the complainant has proven that a respondent has received and accepted a load of produce and has not paid for it, the complainant has satisfied his burden. Then, the burden of proof shifts to the respondent who has to prove, by a preponderance of the evidence, that it was damaged by a breach of contract committed by complainant and the amount of those damages. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970); *The Grower-Shopper Pot. Co. v. Southw. Pro. Co.*, 28 Agric. Dec. 511 (1969).

Each of the three subject shipments must be viewed independently. As to the July 31, 1984, shipment of 324 cartons of cantaloupes, the only dispute surrounds the disposition of 127 cartons of cantaloupes. Respondent, which admits receiving and accepting all 324 cartons, has failed to adduce any evidence regarding the disposition of the missing 127 cartons. It could have, but it did not, provide

documentation showing that its customer, J. A. Besteman Co., dumped or lost the 127 cartons. Respondent's self-serving assertion in its answer that this occurred is not sufficient for it to carry its burden of proof.¹ *Leo Young, Inc. v. J. Schlanger & Sons*, 16 Agric. Dec. 716 (1957). Accordingly, we must hold respondent liable to complainant for the full contract price for the 324 cartons of cantaloupes (\$2,268.00). As it has paid complainant \$1,379.00 for this lot, it remains obligated to complainant in the amount of \$889.00 and its failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded. In so ruling, we are not unmindful of the fact that the cantaloupes had previously been rejected by the original purchaser. However, we are constrained by respondent's failure to submit proof as to the disposition of the 127 cartons for which it has failed to pay complainant to rule in complainant's favor.

As to the August 2, 1984, shipment of 175 cartons of cantaloupes, complainant has failed to prove that respondent had entered into any kind of contractual arrangement with it which would have obligated respondent to pay it for the cantaloupes. The record indicates that this lot of cantaloupes, which had earlier been rejected by complainant's customer, arrived at respondent's location in an unsalable condition, and that all respondent agreed to do was to unload the cantaloupes from the truck for the purpose of dumping them. Accordingly, the complaint as to this lot of cantaloupes must be dismissed.

The dispute as to the August 5, 1984, shipment of 500 cartons of eggplant solely focuses on the price agreed upon between the parties. Complainant asserts that the price was \$10.50 per case. In support of its position, complainant has shown that its cost for the eggplant was \$8.50 per carton. On the other hand, respondent asserts that the price agreed upon was \$7.00 per carton, but has offered no evidence in support thereof. As respondent has failed to adduce any evidence in support of its position, and as it is illogical to assume that, barring any evidence that the condition of the eggplant had deteriorated, a shipper would sell produce for \$1.50 per carton less than its cost, we must hold that the parties agreed upon a price of \$10.50 per carton. The total price agreed upon by the parties was \$5,250.00. Respondent has already paid complainant \$3,500.00. It, therefore, remains obligated to complainant in the amount of \$1,750.00, and its failure to pay complainant this

¹ Had respondent submitted a sworn affidavit from J. A. Besteman Co., we might have ruled otherwise. However, it is now too late to reopen the record for admission of such a document. See 7 CFR § 47.24(b).

amount is a violation of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$2,639.00 (\$889 + \$1,750) plus interest at the rate of 13 percent per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

J.R. BROOKS & SONS, INC. v. ATLANTIC TROPICAL MARKETING CORPORATION. PACA Docket No. 2-6936. Decided November 24, 1986.

FOB Sale—Breach of contract—Reparation awarded.

Respondent failed to provide any evidence to support its contentions that it never contracted for produce shipped to it and that it duly rejected the produce upon arrival.

Jory Hochberg, presiding officer.

John Himmelberg, for complainant.

Jose Fuentes, Union City, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant now seeks an award of reparation against respondent in the total amount of \$13,920.00, in connection with the sale of 2,320 flats of avocados in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an Answer on August 21, 1985.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of additional sworn statements. Complainant availed itself of this opportunity, but respondent failed to file its statement in a timely manner. No further statements were filed by the parties. Complainant filed a brief while respondent chose not to do so.

FINDINGS OF FACT

1. J. R. Brooks & Son, Inc. is a corporation whose business mailing address is P.O. Box Drawer 9, Homestead, Florida 33090.

2. Atlantic Tropical Marketing Corp. is a corporation whose business address is 729 Clinton Street, Hoboken, New Jersey 07030. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 16, 1984 by oral agreement, complainant sold to respondent 2,320 flats of avocados at the agreed price of \$6.00 per flat for a total cost of \$13,920.00, delivered.

4. Pursuant to this contract, on July 17, 1984, complainant shipped the 2,320 flats of avocados from its place of business to the respondent by truck. Immediately prior to this shipment the avocados were inspected and found to be in suitable shipping condition.

5. The shipment of avocados was delivered to the respondent and signed for by an employee of respondent on July 20, 1984. The truck carrying this shipment had a refrigeration unit which maintained the temperature at 42 degrees Fahrenheit during the entire trip. I116. Complainant billed respondent \$13,920.00 for this shipment which respondent has failed to pay.

7. An informal complaint in this proceeding was filed on January 21, 1985, which was within the nine months after the cause of action accrued. The formal complaint was then filed on May 24, 1985.

CONCLUSIONS

The record in this proceeding clearly supports an order requiring respondent to pay complainant the full amount billed for the avocados which were delivered to respondent. The evidence demonstrates that during the period from at least July 17, 1984, through December 11, 1984, the parties entered into numerous oral contracts for the sale of both avocados and limes by complainant to respondent. With respect to the shipment in question, complainant's sworn statements and documentation support the conclusion that the avocados were shipped to respondent pursuant to an oral contract at an agreed invoice amount of \$13,920.00. Complainant's evidence further supports the conclusion that the avocados were signed for and accepted by an employee of respondent and were delivered in suitable condition.

Respondent claims in its Answer that it never contracted for the produce in question and that it duly rejected the goods on arrival, such rejection having been accepted by complainant. However, since respondent has not provided any evidence to support the allegations in its answer, it is concluded that respondent contracted for

and accepted the avocados, as supported by complainant's evidence. *Gafford v. Bananas, Inc.*, 17 Agric. Dec. 360 (1958); See *Harland W. Chidsey Farms v. Geurin*, 27 Agric. Dec. 384 (1968).

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$13,920.00 with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GRANADA MARKETING, INC. v. DURANTE AND TERMINI, INC. PACA
Docket No. 2-6954. Decided November 24, 1986.

Contract requirements—Notice of rejection—Misrepresentation of federal inspection results—Reparation awarded.

Where complainant relies on respondent's misrepresentation of the federal inspection results, and on the basis of such misrepresentation, agrees to a price after sale novation, the novation agreement is void.

Sharlene W. Lassiter, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). The complainant timely filed an informal complaint in which the complainant sought an award of reparation against respondent in the amount of \$14,241.60 in connection with two shipments of grapes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability.

Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and affidavits from its employees, Rick Eastes and William Karney. The respondent filed affidavits from Fred Durante, presi-

dent of respondent company, and Ralph Jarson, a broker for the respondent. Both parties filed a brief.

FINDINGS OF FACT

1. Complainant, Granada Marketing, Inc., hereinafter referred to as Granada, is a corporation whose mailing address is P.O. Box 3006, Visalia, California 93278.

2. Respondent, Durante and Termini, Inc., hereinafter referred to as Durante, is a corporation whose mailing address is 39-41 South Water Market, Chicago, Illinois 60608. At the time of the transactions involved herein, Durante was licensed under the Act.

3. On September 7, 1984, in the course of interstate commerce, Granada sold and shipped to Durante, from Visalia, California to Chicago, Illinois, 1680 lugs of Thompson Seedless Grapes pursuant to an oral contract negotiated by William Karney, a salesman employed by Granada and Ralph Jarson, a broker for Durante, at a f.o.b. price of \$12,958.50, invoice #19774.

4. Durante received and accepted the September 7, 1984 shipment.

5. Granada acknowledged that there was full payment for the September 7, 1984 shipment after submission of the formal complaint, due to a price adjustment.

6. On October 9, 1984, in the course of interstate commerce, Granada sold and shipped to Durante, from Strathmore, California to Chicago, Illinois, 1380 lugs of U.S. No. 1 table grapes, 980 lugs Thompson Seedless @\$12.00 per lug, 180 lugs Emperor @\$9.00, and 270 lugs Ruby Seedless @\$12.00, pursuant to an oral contract negotiated by William Karney for Granada and Ralph Jarson for Durante, total f.o.b. price of \$17,008.50, invoice #19838.

7. Durante received the 1380 lugs of grapes on October 12, 1984.

8. Durante obtained a federal inspection of the grapes at 11:30 a.m. on October 12, 1984 which rated the condition of the grapes, in pertinent part, as follows:

Each lot: Berries generally firm and firmly attached to capstems.

Ruby Seedless lot: Stems mostly green, some turning brown and pliable. Average 3% shattered. Decay in most lugs none, in some 3 berries.

Thompson Seedless lot: Stems generally turning brown and pliable. From 3 to 12% per lug, average 7% shattered. Average less than 1% decay.

Emperor lot: Stems generally green. Average 1% shattered. Decay in most lugs none, in many 3 berries.

9. The condition of the 1380 lugs of table grapes was within the range of tolerance of grade U.S. No. 1 Table as prescribed in 7 CFR 51.880 *et seq.*

10. Durante paid Granada \$9,486.90 for the October 9, 1984 shipment of 1380 lugs of grapes.

11. Granada filed a formal complaint on June 24, 1985, and an informal complaint on March 29, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This reparation proceeding involves only the October 9, 1984 transaction, i.e. the purchase of 1380 lugs of assorted grapes by Durante, since complainant acknowledged full payment with respect to the September 7, 1984 transaction. Granada alleges that Durante purchased the grapes on October 9, 1984, but has yet to remit the balance of the purchase price, \$7,521.60. In this case, rejection and misrepresentation are the two issues which dictate the necessity of an order in favor of Granada.

As the moving party, the complainant has the burden to prove by a preponderance of the evidence the affirmative allegations of this complaint. *New York v. Sandler*, 32 Agric. Dec. 702, 705 (1973). Granada met its burden in this case. The invoice #19838, bill of lading, and confirmation of sale letter from Durante's broker, Mr. Jarson, proffered by Granada, show the existence of a contract for 1380 lugs of assorted U.S. No. 1 Table grapes between Granada and Durante and the agreed upon price terms. Durante claims that the parties agreed to change the price terms because of the poor condition of the grapes upon arrival in Chicago on October 12, 1984. Durante proffers verified statements from Mr. Durante and Mr. Jarson which state that on October 12, 1984, Mr. Durante and Mr. Jarson called Granada to complain about the quality of the grapes and to negotiate a change in the price per lug term to a price after sale agreement. During the telephone call, Mr. Jarson orally communicated his understanding of the federal inspection results to Mr. Karney. It seems that Mr. Durante intended his telephone complaint to serve as a notice of rejection and his oral report of the federal inspection results to be sufficient proof of the poor condition of the grapes to persuade Granada to alter the price per lug term of the original contract.

The October 12, 1984 telephone complaint was not sufficient to constitute rejection. Notice of rejection must be in clear and unmistakable terms, such that a mere complaint is not sufficient. *Mario*

Saikhon v. Russel-Ward Co., Inc., 34 Agric. Dec. 1940 (1975); *Jarson & Zerilla Co., Inc. v. P. Tavilla Co., Inc.*, 30 Agric. Dec. 1360 (1971); *Schley v. Mercurio*, 23 Agric. Dec. 862 (1964). Therefore, Durante is deemed to have accepted the 1380 lugs of assorted grapes and is liable for the full purchase price as of October 12, 1984.

The second issue is misrepresentation. We find that Mr. Durante misrepresented the condition of the grapes to Granada. Mr. Durante's state of mind is shown by his statement that he knew the grapes were in poorer condition than the inspection report showed. However, by law, the federal inspection report is *prima facie* evidence of the facts set forth therein. *Commonwealth Fruit & Produce Co., Inc. v. Idaho Falls Bonded Produce & Supply Co.*, 32 Agric. Dec. 1734, 1738 (1978). Because Mr. Durante failed to inform Granada's representative Mr. Karney accurately of the true inspection results, Granada is permitted to rescind the price after sale novation. *Mendelson-Zeller Co. v. W.M. Turino Co.*, 32 Agric. Dec. 1972, 1981 (1973); *Tom Bengard Ranch Inc. v. Tomatoes, Inc.*, 41 Agric. Dec. 1637, 1639 (1982). On October 12, 1984, the federal inspector orally reported to Durante the condition of the grapes which eventually would appear on the written certificate. Mr. Durante states that he did not agree with the federal inspector's quality evaluation and communicated his personal evaluation, as well as the results of the federal inspection, to Mr. Jarson. On the same day, Mr. Jarson called Mr. Karney at Granada to complain about the quality of the grapes and read the results of the inspection, given to him by phone, to Mr. Karney. Mr. Karney recorded Mr. Jarson's communication on Granada's notice of complaint form and cited the condition of the grapes as follows:

Ruby Lot—3% Shatter, Decay in Most, Some none, Avg. 3% decay. *Thompson Lot*—1% Shatter, 3-12 Avg. 7% Serious damage by wet crushed and split. 1% damage by Brown discoloration, 1% decay.

Grapes of this quality would not qualify for a grade U.S. No. 1 Table as prescribed in 7 CFR § 51.880 *et seq.*, and thus there would be a breach of the contract between the parties. As the result of Mr. Durante's and Mr. Jarson's inducement and the degree of damage reported by Mr. Jarson, Mr. Karney agreed to change the price per lug terms to a price after sale agreement, which Mr. Jarson confirmed on October 17, 1984. Durante then sold the 1380 lugs for \$9,486.90 on or before November 15, 1984, and remitted the same to Granada. Shortly thereafter, Granada received the written federal inspection certificate. The certificate revealed that the condition of the grapes was within the range of tolerance for grade

U.S. No. 1 Table, and therefore, not a breach of the contract. Mr. Karney stated that he would not have agreed to the price after sale arrangement if he had known of the true results of the federal inspection. The totality of the evidence submitted is dispositive of the truth in Mr. Karney's statement. Durante misrepresented the true condition of the grapes received by Granada. Granada relied on this misrepresentation when it agreed to the price after sale novation. Accordingly, the novation must be declared as void and the original terms of the contract remain in force. Durante is liable for the full purchase price of \$17,008.50 less the amount already remitted, \$9,486.90. Granada must be awarded reparation in the amount of \$7,521.60.

ORDER

Within 30 days from the date of this Order, respondent Durante and Termini, Inc., shall pay to Granada, as reparation, \$7,521.60, with interest thereon at the rate of 13% per annum from November 1, 1984, until paid.

Copies of this Order shall be served upon the parties.

BONITA PACKING Co., INC. v. PETER G. PAPPAS and PHILLIP G. PAPPAS d/b/a PETE PAPPAS & SONS. PACA Docket No. 2-6955.
Decided November 24, 1986.

Contract term--Reparation awarded.

Complainant sold and shipped to respondent a truckload of tomatoes "to be priced on next week's market." It was held that the term should be construed to refer to average prices for the following week as reflected by Market News Service Reports.

George S. Whitten, presiding officer.

Complainant, *pro se*.

George I. Charles, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$4,000.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bonita Packing Co., Inc., is a corporation whose address is P.O. Box 309, Bonita Springs, Florida.

2. Respondent, Pete Pappas & Sons, is a partnership composed of Peter G. Pappas and Philip G. Pappas whose address is P.O. Box 1292, Washington, D.C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 20, 1985, complainant sold to respondent one truckload of tomatoes containing 400 size 6×6, 800 size 6×7, and 400 size 7×7, f.o.b., "to be priced on next week's market."

4. Complainant shipped the tomatoes to respondent on January 20, 1985, and the tomatoes were received and accepted by respondent on arrival. Respondent has paid complainant \$13,040.00 for the tomatoes.

5. The formal complaint was filed on May 10, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant states in its informal complaint that the tomatoes were sold "with the agreement, with the broker, that they would be billed out Tuesday, the 22nd, or Wednesday, the 23rd, when the market was established." Respondent states in its answer that the agreement was that the tomatoes "would be priced on 'next week's market'". The record shows that the contract was negotiated through a broker, Frank DeTrani, who both parties admit was acting as an agent for respondent. This broker issued a broker's memorandum of sale which clearly stated on the face thereof "to be priced on next week's market".

Respondent takes the position that the term "next week's market" is not a specific contractual understanding and that the term must be interpreted to mean "market protection or open

basis". It is true that the term generically falls into the category of an "open price term" as those words are used in UCC § 2-305, i.e. "The parties if they so intend can conclude a contract for sale even though the price is not settled". However, the succeeding sentence providing for a reasonable price at time of delivery does not apply since none of the three prescribed conditions is applicable. See *A. Duda & Sons, Inc. v. Pete Pappas & Sons*, PACA Docket No. 2-6940, 45 Agric. Dec. ____ (1986). The term "to be priced on next week's market" should be given its plain and simple meaning, that is, the average prices for the following week. See *Id.*

Federal-State Market News reports issued out of the Jessup, Maryland office show shipping point tomato prices from South and Central Florida beginning with Wednesday, January 23, 1985. (The reports for Monday and Tuesday show that the market was unsettled with practically all sale prices to be established later). The Wednesday report shows that 85% or better U.S. No. 1 quality tomatoes were selling for \$18.00 per carton for size 6×6, \$16.00 per carton for size 6×7 and \$12.00 per carton for size 7×7. The reports for Thursday and Friday of that week show the same prices.

Complainant voluntarily reduced the amounts claimed on this load to \$13.00 for the size 6×6, \$11.00 for the size 6×7, and \$7.00 for the size 7×7, plus \$.15 per carton for palletizing, or a total of \$17,040.00. Under the circumstances of this case we consider this to be a reasonable price, and in conformity with the contract between the parties. Respondent has already paid complainant \$13,040.00 of this amount leaving a balance still due and owing of \$4,000.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$4,000.00, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RICHARD S. BROWN, INC. v. Post & TABACK, INC. PACA Docket No. 2-7080. Decided November 24, 1986.

Acceptance—Measure of damages—Reparation awarded.

Where lot of lettuce was delivered in damaged condition resulting from breach of contract by seller, buyer who accepts load by unloading is entitled to deduct damages from contract price.

Edward M. Silverstein, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$1,352.00 in connection with a transaction in interstate commerce involving lettuce, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint and filed an answer thereto in which it denied any further liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements. Complainant filed a certified opening statement, and respondent filed a verified answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Richard S. Brown, Inc., is a corporation whose mailing address is P.O. Box 4729, Salinas, California 93912.

2. Respondent, Post & Taback, Inc., is a corporation whose mailing address is 253-256 N.Y.C. Terminal Market, Bronx, New York 10474. At all material times, respondent was licensed under the Act.

3. On April 11, 1985, in the course of interstate commerce, complainant sold, by oral contract, 410 cartons of lettuce, a perishable agricultural commodity, to respondent at an agreed f.o.b. price of \$3.50 per carton (\$1,435.00) plus 65 cents per carton for cooling

(\$266.50) for a total agreed f.o.b. price of \$1,701.50. The contract was negotiated through Tom Lange Co., Inc., Salinas, California, acting as the broker.

4. The lettuce was shipped by complainant on April 11, 1985, and arrived at respondent's location late on April 15, 1985. It was the subject of a federal inspection on April 16, 1985, at respondent's business location after it had been unloaded from the truck. The lettuce had been unloaded to enable respondent to reach a lot of asparagus, shipped by someone other than complainant, which was loaded in the nose of the truck. The inspector noted the condition of the lettuce as follows: "Generally fresh and crisp wrapper leaves no decay. Head leaves 2 to 6 heads per carton average 17% damage by Tipburn 1 to 4 heads per carton average 10% Bacterial Soft Rot in various stages affecting 1 to 2 leaves."

5. Respondent reported the condition of the lettuce to the Tom Lange Co., Inc., which, in turn, reported it to complainant. The broker, however, erroneously reported to complainant that the lettuce had not been unloaded from the truck. Complainant, based on the information that the lettuce had not been unloaded and its condition, agreed to have respondent handle the lettuce on consignment. Tom Lange Co., Inc., issued a broker's confirmation as to this agreement.

6. On or about April 15, 1985, respondent accounted to complainant for the lettuce as follows:

Units	Price	Total	
15	\$6.00	90.00	
180	5.50	990.00	
195	5.00	975.00	
20	4.00	80.00	
<hr/> 410		<hr/>	\$2,135.00
Less: Freight			\$1400.00
Term. Chg.			6.15
Inspection			40.30
Unloading @ 15¢/carton			61.50
Commission (13%)			277.55
			<hr/> \$1,785.50
			\$349.50

7. Respondent sent complainant a check in the amount of \$349.00 which complainant refused to negotiate until respondent released it as an undisputed amount. The check has now been paid.

8. The complaint was filed on October 7, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is no dispute in this case as to whether the lettuce failed to make good delivery. Complainant concedes this point. *See also* 7 CFR § 46.44(a). Rather, the dispute focuses first on whether the complainant's agreement to have respondent handle the lettuce on consignment was obtained through misrepresentation and consequently is voidable, and secondly on the amount which the complainant should have realized from the sale of the damaged lettuce. The facts related to the first issue, whether complainant was made fully aware of all material matters prior to agreeing to allow the respondent to handle the lettuce on consignment must be decided in complainant's favor. The broker, in contacting complainant on respondent's behalf in order to notify the former as to the condition of the lettuce and to make an offer to allow respondent to handle the lettuce on consignment, was operating as an agent for respondent. *PACA Docket No. 5562*, 13 Agric. Dec. 89 (1954). Thus, when the broker incorrectly informed the complainant that the lettuce had not been unloaded off the truck, the broker was acting as an agent for respondent and the giving of this misinformation is attributable to it. Complainant states that, had it known the lettuce had been unloaded off the truck at the time it received the broker's phone call, it would have taken the position that respondent had accepted the lettuce and would not have given it permission to handle the lettuce on consignment. That complainant's permission was obtained through use of this misinformation is undisputed. Consequently, we must conclude that the agreement permitting respondent to handle the lot of lettuce on consignment is void, and that the rights and liabilities of the parties should be determined by the terms of the original f.o.b. sales contract. *Mendelson-Zeller v. Wm. Turino Co.*, 32 Agric. Dec. 1972 (1973).

It is clear that, under the Act, the respondent accepted the lettuce by unloading it from the truck. *Barkley Co. of Ariz. v. Phil Dattilo & Co.*, 28 Agric. Dec. 537 (1969). Accordingly, it became liable for the agreed contract price less provable damages resulting from any breach of contract committed by complainant. *Edward Hiller, Jr. v. Mickelian Sales*, 29 Agric. Dec. 82 (1970). As noted above, it is clear that complainant breached the parties' contract. *See Ritter-Robinson v. C. L. Fain Co., Inc.*, 29 Agric. Dec. 1416 (1970). Accordingly, respondent is entitled to deduct its damages from the parties' agreed contract price. It is noted that, although it claimed it was entitled to the full contract price when it filed its

formal complaint, in its opening statement and in its brief, complainant conceded that, at best, it is entitled to \$1,232.00 which it computes as follows: the parties' contract price (\$1,701.50) less respondent's damages of \$120 (or the Market News price of the lettuce (\$2,255.00 or $\$5.50 \times 410$) less the gross sales received by respondent (\$2,135.00)) less the amount already paid by respondent (\$349.00). Respondent claims that complainant has received all to which it is entitled. Neither position is correct.

Respondent's damages are computed by subtracting the actual value of the lettuce received from the value it would have had had it been as called for under the contract. The value of the lettuce had it met contract requirements is the f.o.b. price (\$1,701.50) plus freight (\$1,400.00), or \$3,101.50. The value of the lettuce actually received by respondent is the total of the gross sales received by respondent from its prompt resale of it, or \$2,135.00. Respondent's damages, therefore, are \$966.50 (\$3,101.50 - \$2,135.00). Subtracting this amount from the agreed contract price (\$1,701.50) leaves a balance due complainant of \$735.00. Respondent should have paid complainant this amount. *Babijuice Corp. of Florida v. J. L. Lustig & Son*, 17 Agric. Dec. 32 (1958). However, it only paid complainant \$349.50. Accordingly, respondent remains liable to complainant in the amount of \$385.50. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant \$385.50, as reparation, plus interest at the rate of 13% per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. v. JOS. NOTARIANNI & COMPANY, INC.
PACA Docket No. 2-7097. Decided November 24, 1986.

Novation—Employee—Complaint dismissed—Counterclaim dismissed.
Where complainant's employee agreed with broker to have shipment of damaged melons transshipped from buyer to third party so the latter could handle for complainant's account, complaint is dismissed.

Edward M. Silverstein, presiding officer.

Complainant, *pro se*.

Sal Cognetti, Jr., Scranton, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$3,603.30 in connection with one transaction, in interstate and foreign commerce, involving mixed melons, each being a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. Also respondent was served with a copy of the formal complaint and filed an answer thereto denying any further liability to complainant with respect to the subject shipment. In addition, respondent filed a counterclaim against complainant seeking reparation in the amount of \$12,500.00 in connection with the same transaction as was made the subject of the complaint.

As neither the amount involved in the complaint nor in the counterclaim exceeds \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was applicable. Under this procedure, the Department's report of investigation, as well as the verified pleadings of the parties, are made part of the evidence of the case. In addition, the parties were given an opportunity to submit further evidence by way of verified statements, however, neither party did so. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose mailing address is P.O. Box 1717, Chula Vista, California 92012.

2. Respondent, Jos. Notarianni & Company, Inc., is a corporation whose mailing address is 301 Genet Street, Scranton, Pennsylvania 18505.

3. At all material times, both complainant and respondent were licensed under the Act.

4. On June 6, 1985, in the course of interstate and foreign commerce, complainant sold to respondent, by oral contract, through H&M Brokerage Co., P.O. Box 1781, Oxnard, California 93032, acting as a broker, a truck load of mixed Mexican melons consisting of 840 cartons of honeydews at \$4.65 per carton (\$3,906.00) and 500 cartons of cantaloupes at \$4.80 per carton (\$2,400.00) plus \$22.50 for a Ryan recording thermometer for a total agreed f.o.b.

price of \$6,328.50. The shipment was picked up on that same date, at 2:00 p.m., and the trucker was instructed to maintain the temperature at 36° F. en route.

5. The truck arrived at respondent's location on June 11, 1985, where it was unloaded and, at 8:45 a.m. of that day, was the subject of a federal inspection. The inspector noted that the temperature of the melons ranged from 41° F. to 44° F. He noted the condition of the melons as follows:

Cantaloupe lot: Generally hard. Ground color mostly green, some turning. Decay ranges 1 to 3 melons in most cartons, none in some, averages 7% *Fusarium Rot* various stages mostly early. *Select Melon Honeydew lot:* Generally hard. Ground color greenish white to white. In most cartons no decay. 1 melon in some averages 4% *Cladosporium Rot* in various stages. *Melon Honeydew lot:* Mostly ripe and Firm, some firm. Ground color mostly cream color, some white. Decay ranges 2 to 4 melons in most cartons, none in some, averages 11% *Cladosporium Rot* in various stages.

6. Respondent notified the broker as to the results of the Federal inspection. The broker contacted Mr. George Ellis, an employee of complainant's, who agreed to have the melons transshipped to Shapiro and Cohen, Inc., 153-155 New York City Terminal Market, Hunts Point, New York 10474, for handling on consignment. Subsequently, on or about June 25, 1985, Shapiro and Cohen returned \$2,725.20 to complainant.

7. A formal complaint was filed on July 29, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case is whether complainant's employee, Mr. George Ellis, agreed to the novation of the parties' original contract and to the broker's suggestion that the melons be handled for complainant's account by Shapiro and Cohen. While the Department's report of investigation contains a statement from the broker to that effect, the complainant has not submitted any statement from Mr. Ellis contradicting it. Complainant's president, Mr. Robert Villalobos, did state, in his verified reply to respondent's counterclaim, that Mr. Ellis did not enter into any such agreement. However, Mr. Villalobos did not explain how he had such knowledge and we cannot, therefore, attribute very much weight to it. In view of this, we hold that the preponderance of the evidence supports a conclusion that complainant, through its agent

Mr. Ellis, agreed that the truck load of melons could be transferred from respondent's location to that of Shapiro and Cohen in order for the latter to handle the melons for complainant's account. *Baldwin v. Harrisburg Daily Market*, 10 Agric. Dec. 589 (1951); *PACA Docket No. 5337*, 10 Agric. Dec. 1468 (1951). Accordingly, the complaint should be dismissed.¹

We next must deal with respondent's counterclaim. As respondent has not adduced any proof of its claimed damages, such counterclaim must be dismissed. *Carol-Ann Produce v. C&J Farms*, 32 Agric. Dec. 1869 (1973). Moreover, respondent's claims for lost profits, and for punitive damages appear to be frivolous and would not have been granted in any event. *S. P. Lipoma v. C.H. Robinson*, 29 Agric. Dec. 499 (1970); *Corley Produce Co. v. Gar Produce Co.*, 19 Agric. Dec. 33 (1960).

ORDER

The complaint is dismissed.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

PACIFIC GAMBLE ROBINSON Co. d/b/a PACIFIC FRUIT & PRODUCE Co.
v. PRODUCE PRODUCTS, INC. PACA Docket No. 2-6946. Decided
November 25, 1986.

Lack of personal knowledge—Burden of proof—Reasonable value—Reparation awarded.

Respondent failed to submit verified answers and there was no showing that person making answering statement had personal knowledge of facts. Consequently, it was found that sale was FOB as alleged by complainant. In addition, the accounting and federal inspection report submitted by respondent were not used. Nevertheless, admissions by complainant were held to show that the sale was of U.S. No. 1 product and that there was a prompt rejection by respondent. Complainant, as a consequence of the effective rejection, had the burden of proving that it complied with the contract and failed to meet such burden. Respondent disposed of the produce and was therefore liable to the complainant for their reasonable value, which in the absence of an accounting, was shown by market reports.

¹It is noted that complainant has received payment from Shapiro and Cohen. However, the record does not reflect whether complainant has negotiated that check. In view of our holding, if complainant has not already done so, it is suggested that it immediately deposit the Shapiro and Cohen check into its account.

George Whitten, presiding officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,308.00 in connection with the shipment in foreign commerce of a truckload of bell peppers.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, and respondent failed to file an answer thereto. On June 7, 1985, a Default Order was issued against respondent. On June 12, 1985, respondent petitioned for reopening after Default and on July 5, 1985, the Default Order was stayed. After service of respondent's petition upon complainant, and consideration of complainant's views, an order was issued on September 18, 1985, reopening after Default and giving respondent opportunity to file a verified answer. On October 3, 1985, respondent filed an answer denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case, as is the Department's report of investigation. Respondent's answer, since it was not properly verified, is not a part of the evidence in this proceeding. However, such answer does serve the purpose of framing the issues between the parties. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant filed a statement in reply which was not properly verified, and was therefore returned to complainant, and will not be considered in this proceeding. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Gamble Robinson Co., d/b/a Pacific Fruit & Produce Co., is a corporation whose address is P.O. Box 425, Kingsburg, California.
2. Respondent, Produce Products, Inc., is a corporation whose address is 231 E. Imperial Highway, Suite 230, Fullerton, California.

At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about April 30, 1984, complainant sold and shipped from loading point in California, to respondent's customer in Los Angeles, California, one truckload of sweet peppers received by complainant from Mexico. The load contained 288 cartons of extra large bell peppers at \$8.50 per carton; 324 cartons of large bell peppers at \$8.50 per carton; and 324 cartons of medium bell peppers at \$6.50 per carton; or a total price for the truckload of \$7,308.00. The peppers were sold to respondent as U.S. No. 1 on a f.o.b. basis.

4. Following arrival of the peppers at the place of business of respondent's customer, such customer rejected the peppers to respondent and respondent notified complainant of such rejection. The peppers were dealt with by respondent, or respondent's customer, on a consignment basis, and respondent remitted \$4,143.00 to complainant.

5. An informal complaint was filed on July 16, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent's petition to reopen after Default included a detailed answer by Scott Triolo who claimed to be the salesman who entered into all negotiations regarding the load of bell peppers with complainant's Marvin Farris. This proposed answer, however, was not verified, and when the order was issued September 18, 1985, reopening after Default, respondent was granted ten days in which to submit a verified answer, and was specifically instructed that if a verified answer was not submitted the original unverified statement in respondent's petition to reopen after Default would be considered the answer in the case. Respondent again submitted the same answer as was submitted in connection with its petition to reopen after Default, and such answer was again not verified. Beside Mr. Triolo's signature on the second submission was a stamp which stated "signature guaranteed Lloyds Bank California" with the signature of the assistant cashier/manager. At the bottom of the page respondent had written in ink "our notary was out at the time". It is well settled that an administrative agency is bound to follow its own rules. Section 47.20 of the Rules of Practice (7 CFR § 47.20) specifically provides that under the shortened method of procedure the pleadings of the parties will be considered as evidence in the proceeding only if verified in accordance with paragraph h of the section. Paragraph h of section 47.20 states "verification shall be made under oath of any fact set forth in the pleadings or statement by the person who signs the pleading or state-

ment". There is then set forth a suggested form of verification. The guarantee of a signature by a bank cashier, of course, does not qualify as a verification. Consequently, neither respondent's answer, nor the exhibits attached thereto, can be considered as evidence in this proceeding.

The answering statement submitted by respondent was signed by George Haddad, Vice President and General Manager of respondent, and there is nothing in such answering statement to show that Mr. Haddad had personal knowledge of the matters related in the statement. Consequently this statement is of negligible value as evidence.

Briefly, respondent claims that the peppers were sold on a delivered basis, that upon arrival the peppers were rejected by its customer, and that respondent gave notice of such rejection to complainant who requested a federal inspection. Respondent states that he could not get a federal inspection that day, and that an inspection was secured on May 2, 1984. Respondent further alleges that when complainant was informed of the results of the inspection complainant agreed to the peppers being handled on consignment. Respondent claims to have paid complainant the net proceeds for the peppers.

Complainant's Marvin Farris claimed in the opening statement that the peppers "were not sold as U.S. No. 1". However, paragraph 4 of complainant's formal complaint describes the peppers as U.S. No. 1. Complainant's Marvin Farris also stated in the opening statement that "on information and belief, the shipment was rejected at the original delivery point, but complainant was not notified of the rejection." However, the same Marvin Farris stated in the informal complaint as follows:

ON APRIL 30TH 1984, A LOAD OF BELL PEPPERS WERE SENT TO WEST COAST FRUIT OF LOS ANGELES, CA. WITH PRODUCE PRODUCTS OF FULLERTON ACCEPTING BILLING ON THE PRODUCT.

WEST COAST REJECTED THE LOAD OF BELL PEPPERS. I WAS INFORMED OF THIS AND AT THAT TIME AN INSPECTION WAS REQUESTED. THE INSPECTION WAS NOT TAKEN UNTIL THE FOLLOWING DAY.

Complainant claimed in the formal complaint that the peppers were sold on a f.o.b. basis. However, the copy of the invoice attached to the complaint nowhere indicates the terms of sale. Had respondent's allegation that the sale was on a delivered basis been in evidence we would have so found. Since it is not in evidence we

have no alternative, on the basis of the evidence of record, but to find that the sale was f.o.b. We also find that the peppers were sold as U.S. No. 1 grade, and that respondent made a prompt rejection of the peppers.

The inspection report submitted by respondent shows delivery of a fairly good load of bell peppers which clearly did not deliver as U.S. No. 1, and would just barely fail to make good delivery for peppers sold as U.S. No. 1 on a f.o.b. basis. However, the only copy of the inspection submitted in this proceeding was submitted in connection with respondent's answer, and consequently the inspection report is not in evidence.

Where a load of produce is rejected and proper notice is given, the seller has the burden of proving that it complied with the contract. *Bud Antle, Inc. v. J. M. Fields, Inc. a/t/a Worldwide Produce*, 38 Agric. Dec. 844 (1979); *Heggeblade-Marguleas-Tenneco v. Fisher Foods*, 38 Agric. Dec. 1443 (1974); *Bud Antle, Inc. v. Bolrack*, 32 Agric. Dec. 1589 (1973). Since no inspection report is in evidence in this proceeding complainant has failed to meet this burden and we conclude, therefore, that respondent's rejection was rightful. Following this rightful rejection the peppers became the responsibility of complainant. *Yokoyama Bros. v. Cal-Veg. Sales*, 41 Agric. Dec. 535 (1982). However, it is apparent that respondent disposed of the peppers. Accordingly, respondent is liable to complainant for their reasonable value. See *Sunrise Fruit v. Great Bridge Foods*, 33 Agric. Dec. 1342 (1974). Unfortunately respondent's accounting is not in evidence. Under these circumstances reasonable value is deemed to be market value at destination as shown by applicable Market News Service quotations. *Id.* Since complainant failed to show a wrongful rejection we feel justified in using the lower of the fair quality and condition quotations where possible. The Los Angeles Wholesale Market Reports for May 2-4, 1984, show the lowest price for fair quality or condition extra large peppers from Mexico as being \$10, and the lowest price for fair quality or condition large and medium peppers from Mexico as being \$8. The 288 cartons of extra large peppers would, therefore, have had a value of \$2,880, and the 648 cartons of large and medium peppers would have had a value of \$5,184. The total value for the load would be \$8,064. The record does not disclose who paid freight, nor the amount of freight incurred. However, we deem it appropriate to allow a 15% selling commission to respondent, or \$1,209.60. This leaves respondent's net liability to complainant as \$6,854.40. Respondent has already paid complainant \$4,143.00, which leaves a balance still due of \$2,711.40. Respondent's failure to pay complainant this amount is a

violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$2,711.40, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

R.M. ALLRED and RONALD D. ALLRED d/b/a ALLRED'S PRODUCE v.
RICHARD C. SHELTON d/b/a/ MID-VALLEY BROKERAGE CO. PACA
Docket No. 2-6967. Decided November 25, 1986.

Burden of proving breach of warranty—Damages—Resale not prompt and proper—Reparation awarded.

Where respondent proved a breach of suitable shipping conditions warranty but failed to prove damages because resale found not prompt and proper, respondent liable for the contract price of the accepted tomatoes.

Andrew Stanton, presiding officer.

Stephen P. McCarron, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,302.50 in connection with a quantity of tomatoes sold to respondent in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, R. M. Allred and Ronald D. Allred d/b/a Allred's Produce, is a partnership whose address is 4115 Michael Boulevard, McAllen, Texas.

2. Respondent, Richard C. Shelton d/b/a Mid-Valley Brokerage Co., is an individual whose address is P.O. Box 5546, McAllen, Texas. At the time of transaction involved herein, respondent was licensed under the Act.

3. On approximately January 24, 1985, complainant sold to respondent a quantity of tomatoes consisting of 201 cases of 5×6 tomatoes at \$8.50 per case and 66 cases of 5×5 tomatoes at \$9.00 per case, for a total contract price of \$2,302.50, f.o.b. A contract destination was not agreed to at the time of the sale.

4. Respondent shipped the tomatoes to its customer, Kaleck Bros., in Philadelphia, Pennsylvania, where they arrived on January 28, 1985, and were federally inspected. The inspection found temperatures of 43 to 47°F. and an average of 3% decay and 41% soft. Respondent notified complainant of the inspection results.

5. Kaleck Bros. obtained gross proceeds of \$537.50, from which it deducted \$66.00 for inspections, \$267.00 for freight, \$13.35 for drayage, and \$75.25 for commission, for net proceeds of \$115.90. Respondent offered this sum to complainant as payment in full, but complainant refused to accept the payment under the conditions offered.

6. A formal complaint was filed on August 8, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the tomatoes, and thus became liable for the agreed upon contract price, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Growers Exchange, Inc. v. Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983).

Respondent claims there was a breach of warranty by complainant, as the tomatoes were severely deteriorated when they arrived at the place of business of respondent's customer, Kaleck Bros., Philadelphia, Pennsylvania, on January 28, 1985. Respondent has submitted into evidence a federal inspection which confirms his claim of severe deterioration. Complainant argues that the warranty is inapplicable as there was no contract destination agreed upon between the parties. In his sworn answer and answering statement, respondent insists that there was no contract destination agreed to by the parties when he purchased the tomatoes. Complainant, in

its complaint and opening statement, claims that it thought respondent had indicated that the tomatoes were going to be shipped to Baton Rouge, Louisiana, but in its brief admits that no contract destination was agreed upon. We can only conclude from the evidence in the record that at the time of sale, the parties had not agreed to any particular destination other than respondent's place of business in McAllen, Texas, which was also the shipping point. Accordingly, complainant's suitable shipping condition warranty would not be applicable to Philadelphia, Pennsylvania, the ultimate destination, where the tomatoes were found to be decayed on January 28, 1985. See *Joseph F. Byrnes Produce, Inc. v. Kaleck Distributing Co.*, 40 Agric. Dec. 997 (1981). However, the condition of the tomatoes on January 28, 1985, an average of 41% soft and 3% decay, was so poor that it can readily be assumed that the tomatoes would have been in breach of warranty at the agreed upon contract destination, which we presume to have been respondent's place of business in McAllen, Texas, when the load would have arrived there on January 24, 1985, the same day it was shipped. Further, the pulp temperatures found by the inspection, 43 to 47°F., clearly indicate normal transportation conditions. Accordingly, we conclude that respondent has sustained his burden of proving a breach of the suitable shipping condition warranty by complainant.

As damages from complainant's breach of warranty, respondent is entitled to the difference between the actual value of the tomatoes, as determined by a prompt and proper resale, and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest v. Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1988). Complainant questions whether the resale to Kaleck Bros. was prompt and proper. Kaleck Bros., which dumped 200 out of the 267 cases and remitted only \$115.90, accepted the tomatoes on January 28, 1985, four days after they should have arrived at the contract destination, respondent's place of business in McAllen, Texas. Further, the location of Kaleck Bros., Philadelphia, Pennsylvania, is over 1500 miles from respondent. Under these circumstances, we cannot hold that the resale to Kaleck Bros., was prompt and proper and thus an adequate reflection of the actual value of the tomatoes. In the absence of a prompt and proper resale, no damages can be awarded respondent.

Respondent is therefore liable for the contract price of \$2,302.50, and his failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the day of this order, respondent shall pay to complainant, as reparation, \$2,802.50, with interest thereon at the rate of 18 percent per annum from March 1, 1985, until paid. Copies of this order shall be served upon the parties.

MERRILL FARMS *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-6894. Decided December 5, 1986.

Protection agreement—Consignment agreement—Accounts of sale—Reparation awarded.

The parties agreed after arrival of two truckloads of lettuce, to modifications of the original contracts of sale whereby respondent would be granted full protection as to one load, and allowed to handle the other load on a consignment basis. Respondent, however, did not render an accounting as to either load and it was held that both the protection and consignment agreements were voided and respondent was liable to complainant on the basis of the original contracts.

George S. Whitten, presiding officer.

Matthew M. McInerney, Newport Beach, California, for complainant.

LeRoy Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$8,788.50 in connection with the shipment in interstate commerce of two truckloads of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a setoff. Complainant filed a reply to respondent's answer and setoff.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed

an answering statement and complainant filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Merrill Farms, is a corporation whose address is P.O. Box 659, Salinas, California.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P.O. Box 4701, Springfield, Illinois. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 20, 1983, complainant sold to respondent and shipped from loading point in the State of California to respondent in Atlanta, Georgia one truckload containing 870 cartons of size 24 lettuce at \$10.00 per carton, plus 65 cents per carton for vacuum cooling, f.o.b. Complainant informed respondent at the time of sale that the lettuce would weigh approximately 50 pounds per carton.

4. The lettuce arrived at the place of business of respondent's customer in Columbus, Georgia on the morning of May 25, 1983. At that time respondent's manager, Eric R. Hoffman, called respondent's salesman, Bill Gheen, and informed him that the lettuce was light in weight. The parties agreed that 500 cartons of the lettuce should be unloaded at the place of business of respondent's customer in Columbus, Georgia and the remaining 370 cartons should be transported to Atlanta for federal inspection.

5. The 370 remaining cartons of lettuce were federally inspected for weight only at 7:35 a.m. on May 25, 1983, at the place of business of Burnett Produce Co. in Forest Park, Georgia. The inspection revealed a net weight per carton range from 37 to 45½ pounds with an average weight of 41.84 pounds. This information was conveyed by Mr. Hoffman to Mr. Gheen, and it was agreed that respondent would be granted a price reduction of \$2.00 per carton for market decline, and full protection on the lettuce due to the light weight.

6. The firm in Columbus, Georgia which received the 500 cartons of lettuce paid respondent \$8.90 delivered net for the 500 cartons, and Burnett Produce Company paid respondent \$6.95 delivered net for the 370 cartons received by such company. Respondent deducted \$2.25 per carton for freight, and remitted the balance of \$5,064.00 to complainant by check on June 21, 1983. The check was not cashed by complainant until release was obtained through this Department in October of 1983 for the check to be negotiated as an undisputed amount.

7. On May 23, 1983, complainant sold to respondent, and shipped from loading point in the state of California to respondent in At-

lanta, Georgia, one truckload containing 900 cartons of size 24 lettuce at \$6.00 per carton, plus 65 cents per carton for vacuum cooling, or a total of \$5,985.00, f.o.b.

8. On May 27, 1983, at 9:15 a.m., the lettuce was federally inspected at the place of business of Packaging Unlimited in Forest Park, Georgia on application of respondent. The lettuce was inspected while still on board the truck, and temperatures were stated to be "Top 39°F; Bottom 46°F.". Condition of the lettuce was stated to be as follows:

Heads or portions of heads not affected by condition factors are fresh and crisp. Wrapper leaves: Serious damage by small tan to brown spotted discolored areas averages 5%. Decay averages 3%. Head leaves: Decay ranges 1 to 3 heads in ½ of cartons, remainder none, average 4%, Bacterial Soft Rot in mostly early, and some advanced stages.

Respondent's Mr. Hoffman reported the results of this inspection to complainant's Ken Wolf on May 27, 1983, and was granted permission to handle the lettuce on a consignment basis through F. C. Davis Inc. in Atlanta, Georgia.

9. Respondent was paid for the lettuce on the basis of \$4.25 per carton delivered. This amount was accepted by respondent, and respondent deducted \$42.00 for a U.S.D.A. inspection, \$2,250.00 for freight, and \$135.00 brokerage, and remitted the sum of \$1,398.00 to complainant on June 17, 1983. Complainant did not cash the check from respondent until October of 1983 after securing its release as an undisputed amount through this Department.

10. An informal complaint was filed on August 5, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the full purchase price of the two truckloads of lettuce less the amounts already paid by respondent. When the formal complaint was filed complainant requested the original full price on the first load of lettuce, but later reduced the amount claimed by \$2.00 per carton on the basis of the allowance for market decline. Complainant denied in its reply to respondent's setoff and answer that it agreed to granting full protection on the first load of lettuce or that the second load of lettuce could be handled on consignment. We have carefully reviewed all of the evidence of record and have concluded that respondent has met its burden of proving by a preponderance of the evidence that full protection was granted on the first load, and that the parties did agree to the second load being handled on a consignment basis.

Respondent additionally alleges that as to the first load of lettuce its Eric Hoffman called Bill Gheen on June 17, 1983, and secured his agreement to the prices at which the cartons of lettuce were sold by respondent's customers. In view of complainant's failure to accept the check sent by respondent on June 17, we find it difficult to credit this allegation, and find on the basis of all of the evidence of record that complainant did not enter into this alleged agreement.

We have held many times that a protection agreement is voided by failure to keep proper records which substantiate the prices received on resale of produce. See *Demarco Produce Co., Inc. v. J. R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980); *Dave Walsh Co., Inc. v. Liberty Fruit Co., Inc.*, 38 Agric. Dec. 533 (1979); *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979); *Northwest Arkansas Produce v. Creasey Co.*, 27 Agric. Dec. 760 (1968); and *Vener Co. v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405 (1956). Since respondent did not furnish complainant with any accounting of the resale of the lettuce contained on the first load the protection agreement is voided, and respondent is liable to complainant for the full original contract price of the lettuce.

The agreement between the parties that the second load of lettuce should be handled on a consignment basis also entails a duty on respondent's part to render an accounting to complainant. Respondent's customer failed to render an accounting to respondent, and respondent has failed to render any accounting to complainant. The reasoning in the cases cited above relative to protection agreements requires that a failure to account in a case such as this must also result in the voiding of a consignment agreement. Respondent is therefore liable to complainant for the full original contract price relative to the second shipment of lettuce.

Respondent is liable to complainant for the full contract price on the first load of lettuce, less the \$2.00 per carton allowance for market decline, or \$7,525.50. Respondent is also liable to complainant for the full original purchase price on the second load, or \$5,985.00. Respondent has already paid complainant a total of \$6,462.00, which leaves a balance due on both loads of \$7,048.50. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$7,048.50, with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

Copies of this order shall be served upon the parties.

DEBRUYN PRODUCE CO. v. BATTAGLIA PRODUCE SALES, INC. PACA
Docket No. 2-6991. Decided December 5, 1986.

Misrepresentation—Contracts—Accounting—Reparation awarded.

The parties entered into a protection agreement on the basis of respondent's unintentional misrepresentation. It was held that the protection agreement was voided. Although an arrival inspection showed considerable damage in one lot of the peaches, such damage was not deemed scorable against peaches sold without a U.S. Grade designation. However, the parties' view that such damage showed a breach was given effect as the true intent of their contract. Respondent, however, did not submit an accounting covering the resale of the peaches and therefore did not prove damages.

George S. Whitten, presiding officer.

Complainant, *pro se*.

Ralph V. Hadley, III, Winter Garden, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,204.20 in connection with the shipment in interstate commerce of a truckload of peaches.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, DeBruyn Produce Co., is a corporation whose address is P.O. Box 76, Zeeland, Michigan.

2. Respondent, Battaglia Produce Sales, Inc., is a corporation whose address is 1705 Weeksville Road, Elizabeth City, North Carolina. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 11, 1984, complainant sold to respondent 260 one bushel containers of peaches, size $2\frac{1}{8}$ inch minimum at \$13.35, and 740 one bushel containers of peaches, size $2\frac{1}{4}$ inch minimum at \$14.35, or a total of \$14,090.00 f.o.b. destination.

4. On or about September 11, 1984, complainant shipped the peaches from loading point in the State of Michigan to respondent's customer P. Tavilla Co. in Miami, Florida.

5. On September 13, 1984, at 8:45 a.m., the peaches were federally inspected during the process of unloading at the place of business of P. Tavilla Co., in Miami, Florida, with the following results in relevant part:

Condition:

Each Lot: Mostly ripe, many firmripe, some firm. Mostly yellow, some turning yellow, some light green color. $2\frac{1}{8}$ inch Lot: Average 2% damage by bruising affecting ripe fruit. Average 2% damage by tan to brown discolored areas. No decay. $2\frac{1}{4}$ inch Lot: A. L. Schmaltz Lot: Ranges 20 to 25%, average 24% damage by tan to brown discolored areas. Average 1% decay. Remainder Lots: Average 1% damage by tan to brown discolored areas. Average 7% damage by bruising scattered throughout pack affecting ripe fruit. No decay.

Remarks:

Inspection made during process of unloading.

6. On September 18, 1984, at 10:35 a.m., the peaches were again federally inspected at the place of business of P. Tavilla Co., Miami, Florida with the following results in relevant part:

Condition:

Greg Orchard, Higbees Farm & Gerold C. Hiler lots—Mostly ripe. Ground color is yellow. *Greg Orchard lot* Average 4% damage by bruises. Ranges 4 to 18% average 9% soft. Average 4% decay (Rhizopus Rot). *Higbees Farm lot*—Ranges 2 to 12% average 7% soft. No decay. *A. L. Schmaltz lot*—Firm to firm ripe. Ground Color is light green to turning yellow. Ranges 2 to 32% average 19% damage by brown surface discoloration. No decay. *Gerold L. Hiler lot*—Ranges 12 to 22% average 17% soft. No decay.

7. On September 13, 1984, when the peaches arrived in Miami, respondent reported to complainant that the Schmaltz Lot of peaches arrived in poor condition, but that the number of cartons in the lot could not be determined because the Schmaltz brand was scattered throughout the load. Complainant granted respondent protection as to the Schmaltz brand, and requested a federal inspection. On or about September 18 or 19 respondent reported to complainant the results of the second federal inspection quoted in Finding of Fact 6 above, but by mistake represented such inspection as having been made shortly after arrival. On the basis of such inspection complainant agreed that the entire load could be handled on a consignment basis.

8. An informal complaint was filed on March 26, 1986, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent attached as an Exhibit to its answer a copy of the complaint which it has filed against P. Tavilla Co., Inc., and such complaint discloses that respondent is in basic agreement with complainant concerning the facts in this case as outlined above in the Finding of Fact. It is clear, therefore, that the full protection granted by complainant to respondent was based on respondent's unintentional misrepresentation of the condition of the produce. Consequently this modification of the contract is to be considered voided. See *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982). The rights and liabilities of the parties must be determined on the basis of the original contract. *Pappas & Co. v. A. & J. Produce Corp.*, 41 Agric. Dec. 1820 (1982).

Although these peaches were not sold with any grade designation we consider the damage indicated in the federal inspection as showing a breach of contract on the part of complainant. In addition a contract is to be interpreted in the light of how it is viewed by the parties thereto. In this case complainant, throughout this proceeding, has clearly indicated that it considers the contract to have been breached in regard to the A. L. Schmaltz lot of peaches. Such lot comprised 106 containers of the 2¼ inch size peaches. Had respondent submitted an accounting showing a breakdown of the sales of the peaches we could have awarded respondent damages in regard to the A. L. Schmaltz lot. However respondent did not submit any such accounting, and consequently we have no means of assessing damages in respondent's favor. See *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979). We find that respondent is liable to complainant for the full contract price of the peaches, less the \$7,885.80 which it has already paid to complainant, or a balance of \$6,204.20. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$6,204.20, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BARTELL MARKETING, INC. v. CHANDLER-TOPIC Co., INC. PACA
Docket No. 2-7020. Decided December 5, 1986.

Change in contract terms—Duty to properly handle produce on consignment.
Respondent sustained its burden of proving that the original FOB terms were changed to a consignment. However, respondent mishandled a portion of the load, and is liable to complainant for what the mishandled produce should have brought if it had been properly handled.

Andrew Stanton, presiding officer.

Complainant, *pro se*.

Stephen P. McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$17,935.20 in connection with a truckload of tomatoes shipped to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds \$15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified or signed by an employee of respondent, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Respondent submitted an answering statement and complainant a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Bartell Marketing, Inc., is a corporation whose address is 7100 North Financial Drive, Suite 103, Fresno, California.

2. Respondent, Chandler-Topic Co., Inc., is a corporation whose address is 7367 Kirkwood Court, Maple Grove, Minnesota. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately January 25, 1985, complainant sold to respondent one truckload of 85% U.S. number one or better green tomatoes, consisting of 550 cartons of extra large at \$14.00 per carton, 640 cartons of large at \$13.00 per carton, and 330 cartons of medium at \$12.00 per carton, plus \$.80 per carton precooling and gassing, for a total contract price of \$21,218.50, f.o.b.

4. The truckload of tomatoes was shipped to respondent, who had a portion delivered to Northwest Produce Co., Inc., Minneapolis, Minnesota (hereinafter, "Northwest") and another portion to S.C. Shannon, Appleton, Wisconsin. The tomatoes were received on January 28, 1985. When both receivers reported problems, respondent's employee, Tim Grace, called complainant's employee, Don Davis, and they agreed that Northwest would handle its part of the load on consignment, and the other part would be sent to J&J Distributing Co., St. Paul, Minnesota (hereinafter "J&J"), for consignment handling. On January 29, 1985, respondent sent a telegram to com-

plainant confirming their agreement, which reads as follows, in relevant part:

In reference to Bartell file #2508 loaded on an MTS truck Chandler Topic #5251 as per discussion with Don Davis the rejected load of tomatoes originally slated for S C Shannon and Northwest Produce have been inspected per request of shipper. With the understanding of full protection on working product out Northwest Produce will handle for the shippers account 200 extra large 640 large and 190 medium. The remaining 350 extra large 140 medium will be placed and inspected with J and J Distributing on the same open basis presented Northwest Produce. If these terms are not as discussed or acceptable to Bartell Marketing and or represented shipper immediate notification is requested.

Complainant never notified respondent that the terms expressed in its telegram were unacceptable.

5. On January 29, 1985, Northwest had its portion of the tomatoes federally inspected, which resulted, in pertinent part, as follows:

WHERE INSPECTED	Applicant's whse.
Products Inspected:	TOMATOES in cartons printed "5½ Brand, Jorge Luis Rodarte & Assoc., Culiacan, Sinaloa, Mexico, Net wt. 25 lbs.," and stamped "Super Select," and to denote size (Lg-EXLG 56A, Med Lg 66A, Med Sm 67A noted.)
	Applicant states 640 cartons 6×6 lot, 190 6×6's and 200 cartons 5×6 lot.
Condition of Load:	<i>Each lot:</i> stacked on pallets in warehouse.
Condition of Pack:	<i>Each lot:</i> well filled.
Temperature of Product:	In various cartons 52° to 56°F.
Size:	<i>Each lot:</i> meets size as marked.

Quality:	<i>Each lot:</i> Mature; well developed; clean; mostly well, some fairly well formed and smooth. 5×6 lot: Grade defects average 6%. 6×6 lot: Grade defects average 5%. 6×7 lot: Grade defects average 5% <i>Each lot:</i> Grade defects are mostly scars and misshapen.
Condition:	5×6 lot. Average approximately 35% green and breakers, 40% turning and pink, 25% light red and red. Average 3% decay. From 2 to 20%, average 9% soft. Average 5% damage by sunken, discolored areas occurring over shoulders. 6×6 lot: Average approximately 45% green and breakers, 35% turning and pink, 10% light red and red. Average 2% damage by sunken, discolored areas occurring over shoulders. From 4 to 18%, average 10% soft. Average less than 1% decay. 6×7 lot: Average approximately 50% green and breakers, 20% turning and pink, 20% light red and red. From 8 to 12%, average 11% soft. No decay. Average 2% damage by sunken, discolored areas occurring over shoulders.
GRADE:	<i>Each lot:</i> Meets quality requirements but fails to grade U.S. No. 1, account condition.

6. Northwest sent an account of sales to respondent dated March 10 1986, showing that, after regrading, it sold 164 of the 200 cartons of extra large tomatoes for \$1,592.00, 524 of the 640 cartons of large tomatoes for \$4,687.90, and 159 of the 190 cartons of medium tomatoes for \$1,417.50. The unsold tomatoes were apparently dumped. Northwest deducted \$1.50 per carton for handling and profit, or \$1,270.50, from its proceeds of \$7,697.40, leaving \$6,426.90. Northwest deducted an additional \$1.25 for each of the original 1,030 cartons, or \$1,287.50, for labor to regrade, and \$42.00 for the cost of inspection, resulting in net proceeds of \$5,097.40. However, Northwest paid respondent \$5,128.50 for the consigned tomatoes.

7. J&J never had a federal inspection for its portion of the load consisting of 350 cartons of extra large tomatoes and 140 cartons of medium tomatoes. J&J sent respondent an account of sales dated May 6, 1985, showing that it had sold the 350 cartons of extra large

tomatoes at \$2.50 per carton, or \$875.00, 100 cartons of the medium tomatoes at \$2.00 per carton, or \$200.00, and 40 cartons of the medium tomatoes at \$2.50 per carton or \$100.00, for a total of \$1,175.00. From this figure, J&J had deducted \$290.00 for trucking and \$.25 per carton, or \$122.50, for storage at Jerry's Produce, St. Paul, Minnesota, leaving \$762.50.

8. Respondent deducted from the proceeds of its sales \$2,100.00 for freight, \$380.00 for handling, and an additional \$127.00 for transportation from the original receiver, S.C. Shannon Co., to J&J. Respondent remitted to complainant \$3,283.20. Respondent has failed to pay complainant any of the \$17,935.20 which complainant claims is past due and owing.

9. A formal complaint was filed on August 29, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent claims that complainant authorized a change in the contract terms to a consignment. Complainant has not specifically denied this contention. Furthermore, the report of investigation contains a January 29, 1985, telegram from respondent to complainant proposing that respondent handle the tomatoes on consignment for complainant's account, and requesting immediate notification from complainant if such proposal is unacceptable (Finding of Fact 4). The record does not indicate, nor does complainant assert that it ever informed respondent that consignment handling would not be permitted. Therefore, it is clear that respondent has sustained its burden of proving a change in the contract terms. *Joe Phillips, Inc. v. G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983).

The next issue is whether respondent fulfilled its duty as a consignee to properly handle the truckload of tomatoes consigned by complainant. See *John Livacich Produce, Inc. a/t/a Vista Sales v. The Auster Company, Inc.*, 42 Agric. Dec. 657 (1983). With respect to the sales by Northwest, although respondent has not provided dump certificates establishing that the 143 cartons allegedly dumped out of the 1030 carton load had no commercial value, the number of cartons dumped is consistent with the poor condition of the tomatoes reflected in the January 29, 1985, inspection report (Finding of Fact 5). The account of sales of Northwest (Finding of Fact 6) shows that, after regrading, it sold 164 cartons of extra large tomatoes for a net of \$1,592.00, 524 cartons of large tomatoes for a net of \$4,687.90, and 159 cartons of medium tomatoes for a net of \$1,417.50, totalling \$7,697.40. These sales appear entirely proper. However, the handling fee deducted by Northwest is not

entitled to be claimed by respondent as a deduction, as respondent has claimed a fee for its commission, as discussed below, and complainant never gave respondent authorization to reconsign the tomatoes. Northwest also deducted \$1.25 per carton, or \$1,287.50, for labor to regrade, which is reasonable, and \$42.00 for inspection fees, which is not a permissible deduction. Therefore, the net proceeds of Northwest which respondent may claim are \$6,409.90.

J&J claims to have sold its portion of the load for only \$1,175.00 (Finding of Fact 7), consisting of 350 cartons of extra large tomatoes for \$875.00, 100 cartons of medium tomatoes for \$200.00, and 40 cartons of medium tomatoes for \$100.00. From this figure, J&J deducted \$290.00 for trucking, which is reasonable, and \$122.50 for storage, which is not. The net figure, \$885.00 is an extremely small return for the consigned tomatoes. Respondent argues that the condition of the tomatoes was poor and the market was not good. However, this argument is not adequate to explain why J&J could not have received prices similar to those of Northwest. Northwest realized from the 200 cartons of extra large tomatoes an average of \$7.96 per carton, less \$1.25 for regrading, or \$6.71. Therefore, J&J should have obtained \$2,348.00 if the 350 cartons of extra large tomatoes had been properly handled. Northwest Produce realized from the 190 cartons of medium tomatoes \$7.46 per carton, less \$1.25 for regrading, or \$6.21. Therefore, J&J should have obtained \$869.40 for the 140 cartons of medium tomatoes, or \$3,217.90 for the entire load.

Respondent should thus have been able to obtain proceeds for the consigned tomatoes of \$6,409.90 and \$3,217.90, amounting to \$9,627.80. Respondent may deduct from this figure its freight of \$2,227.00 and 15% commission, or \$1,444.17, leaving \$5,956.63 to be remitted to complainant. Since respondent has paid only \$3,283.00, it is liable for an additional \$2,673.43, and its failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation \$2,673.43, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NAT FEINN SALES CORPORATION v. SUNLIGHT TOMATO Co., INC.
PACA Docket No. 2-7055. Decided December 5, 1986.

Burden of proof—Evidence of contract—Sale of produce to cover freight—Complaint dismissed.

Complainant failed to sustain its burden of proving any contractual arrangement with respondent, as respondent submitted strong evidence that it refused to purchase the produce from the complainant, but handled it on consignment for the account of the truck broker. Therefore the complaint was dismissed.

Andrew Stanton, presiding officer.

James H. Vallis, Kingsburg, California, for complainant.

Frank V. Charles, Chelsea, Massachusetts, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,426.84 in connection with a truckload of cherry tomatoes allegedly sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the Department's report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements, but declined to do so. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Nat Feinn Sales Corporation, is a corporation whose address is P.O. Box 848, 920 South Topeka, Fresno, California.

2. Respondent, Sunlight Tomato Co., Inc., is a corporation whose address is 145 Market Street, Chelsea, Massachusetts. At the time of the transactions alleged herein, respondent was licensed under the Act.

3. On approximately July 11, 1985, complainant attempted to sell respondent a truckload of cherry tomatoes, but respondent did not agree to the purchase.

4. On July 11, 1985, complainant's employee, Paul Lichter, called Patterson Truck Brokers, Inc., Pharr, Texas (hereinafter, "Patterson"), and spoke to an employee, David Thompson, about securing a truck on behalf of respondent. Thompson called respondent's president, Anthony Sarno, who made clear that he did not want the load that complainant desired to ship. Another employee of Patterson later conveyed this information to Lichter, while a third employee, Joe Lowery, was listening in on the conversation. Lichter said to send the truck anyway and he, Lichter, would take care of Sarno.

5. Complainant shipped the truckload of tomatoes to respondent, who refused to accept them.

6. On approximately July 15, 1985, someone from Patterson informed complainant that the tomatoes had been turned back to the trucker, and asked if complainant would have the truck unloaded at its place of business. Complainant refused, and the Patterson representative stated that the tomatoes would be sold for freight charges. Joe Lowery of Patterson confirmed this discussion in a July 18, 1985, telegram to complainant.

7. Patterson consigned the tomatoes to respondent, who sold them for Patterson's account.

8. A formal complaint was filed on October 28, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that there never was a contract with complainant for the purchase of the load of cherry tomatoes at issue. Complainant insists that the tomatoes were sold to respondent for \$12,426.84, f.o.b., and claims that respondent is liable to it for this sum. Complainant is the moving party herein, and thus has the burden of proving the existence of a contractual relationship between it and respondent. *Cook Sales Company v. Romney Produce Co.*, 42 Agric. Dec. 641 (1983).

The only evidence presented by complainant which purports to show the existence of a contract consists of the allegations to this effect in the sworn complaint, and complainant's invoice, reflecting an f.o.b. sale to respondent. However, there is no evidence that the invoice was sent to respondent. Further, respondent, in its sworn answer, has asserted that it refused complainant's offer to sell the cherry tomatoes. Respondent has offered into evidence the affidavits of two employees of Patterson Truck Brokers, Inc., David Thompson and Joe E. Lowery, who state that on July 11, 1985, they engaged in a telephone conversation with complainant's employee,

Paul Lichter. They state that Lichter requested a truck for respondent, but when they called respondent, its president, Tony Sarno, said he did not want the load. They contend they told this to Lichter, who said to send the truck anyway as he, Lichter, would take care of Sarno (Finding of Fact 4). This strongly supports respondent's claim that it never purchased the cherry tomatoes. Thompson also asserts in his affidavit that respondent thereafter refused to accept the load, and when complainant would not take it back, Patterson consigned the cherry tomatoes to respondent to handle for Patterson's account. The record contains a July 18, 1985, telegram from Lowery to complainant which confirms complainant's authorization to Patterson to sell the cherry tomatoes for freight charges (Finding of Fact 6).

Complainant has not offered any evidence beyond that contained in its complaint to rebut the strong evidence presented by respondent, which shows clearly that respondent never purchased the cherry tomatoes from complainant, but handled them on consignment for the account of the truck broker. We therefore conclude that complainant has failed to sustain its burden of proving the existence of a contractual relationship with respondent. We also conclude that respondent was under no legal obligation to remit the proceeds of its sales to complainant, as complainant was not a party to Patterson's consignment arrangement with respondent. Accordingly, there is no merit to the complaint, and it must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE CO., INC. v. WEINSTEIN PRODUCE SALES, INC. PACA
Docket No. 2-7103. Decided December 5, 1986.

Buyer's liability after acceptance—Burden of proof—Damages—Settlement/
Accord and satisfaction.

Where buyer accepts produce, he is liable for contract price less damages caused
seller's breach of contract.

Edward M. Silverstein, presiding officer
Complainant, *pro se*.
Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$3,770.14, in connection with one transaction in interstate commerce involving mixed produce, all being perishable agricultural commodities.

Both parties were served with copies of the Department's report of investigation. Respondent was also served with a copy of the formal complaint and filed an answer thereto denying any liability to complainant.

As the amount in dispute was less than \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the Department's report of investigation and the verified pleadings of the parties are considered as part of the evidence in the case. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Respondent filed a verified answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tom Lange Co., Inc., is a corporation whose mailing address is P.O. Box 80010, Salinas, California 93902.
2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 7364, Boise, Idaho 83707. At all material times, respondent was licensed under the Act.
3. On December 11, 1984, in the course of interstate commerce, complainant, by oral contract, sold a lot of mixed produce, all being perishable agricultural commodities, on a good delivery basis to respondent. The produce was to be picked up by respondent at complainant's loading dock. Over the next 2½ days, respondent had the produce picked up in accordance with this agreement. The items contained in this shipment, *inter alia*, included 120 cartons of mature green tomatoes sold at \$8.70 per carton (\$1,044.00), 120 cartons of green tomatoes sold at \$9.70 per carton (\$1,164.00), and 3 cartons of red peppers sold at \$22.00 per case (\$66.00). Respondent accepted all of the produce. The total agreed contract price for the lot of mixed produce was \$10,508.00.

4. Upon receiving the various items in Boise, Idaho, respondent, on December 14, and December 17, 1984, had some of them inspected. Among the items inspected were the green tomatoes. The inspection certificate issued following the December 14, 1984, inspection (E 193864) of the tomatoes reflected their condition as follows: "Average approximately 95% light red and red. Average 2% damage by numerous sunken discolored areas generally occurring over shoulders. Average 3% Decay ALTERNARIA ROT. Tomatoes show light colored surface mold in stem scar." Also, the three cartons of red peppers were among the items inspected. The inspection certificate (E 193867) relating to the red peppers reflected the condition of the peppers as follows: "Decay ranges 38 to 48%, average 43% affecting pods average 7% affecting stems, Bacterial Soft Rot in various stages. Remainder fresh, firm, and characteristic color. Average 7% shrivelled areas, affecting 5 to 10% of surface."

5. After respondent reported the condition of the produce to complainant, the latter offered to reduce the agreed contract price by \$977.00. Respondent did not accept this offer.

6. On or about January 7, 1985, respondent accounted to complainant for the tomatoes and red peppers as follows:

Tomatoes			
Sales:		18 @ \$7.50	\$135.00
		22 @ 6.75	148.50
		42 @ 5.25	220.50
		81 @ 4.00	124.00
		47 @ 3.00	141.00
		Total Sales	\$769.00
Expenses:	Rerun	240 @ 75¢	\$180.00
	Dumped	70 @ 25¢	17.50
	Freight	240 @ 80¢	192.00
	Warehouse and Selling @ 15%		115.85
	Total Cost		\$504.85
			\$264.15

Red Peppers			
Sales:	0		
Expenses:	Freight	3 @ 80¢	\$2.40
	Dumping	3 @ 25¢	.75
	Total Cost		\$3.15

Respondent, also, accounted to complainant for two cartons of eggplants. However, no eggplants were included on the subject shipment.

7. At some time thereafter, respondent paid complainant \$5,706.86 with respect to this shipment.

8. An informal complaint was filed on January 24, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is no dispute regarding the fact that respondent received and accepted the truckload of mixed produce. Accordingly, respondent is obligated to complainant for the full purchase price for the lot of mixed produce less any damages resulting from a breach of contract committed by complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof on such matters. *The Growers-Shipper Pot. Co. v. Southw. Prod. Co.*, 28 Agric. Dec. 571 (1969).

For the most part, respondent has failed to sustain its burden of proof regarding the damages it allegedly sustained as a result of the alleged breach of contract committed by complainant. However, it has proven that complainant shipped red tomatoes rather than green tomatoes and that the red peppers it received were unmerchantable. With regard to these items it has proven that it sustained damages of \$1,897.65, i.e., the contract price plus freight of the damaged merchandise (\$2,468.40) less the result of the resale (\$769.00) plus incidental costs such as dumping and rerunning the merchandise (\$198.25). See *Bosgraaf Sales v. Alexander Marketing*, 26 Agric. Dec. 1201 (1967). When this amount is deducted from the parties' agreed contract price of \$10,508.00, the balance remaining is \$8,610.35. This is the amount which respondent should have paid complainant. However it only paid the latter \$5,760.86. Thus, it remains obligated to complainant in the amount of \$2,849.49.

The next issue we must discuss is whether the parties negotiated a settlement with regard to this shipment. Since complainant made this allegation, it has the burden of proving it by a preponderance of the evidence. *J. E. Nelson & Sons v. Quality Produce Co.*, 16 Agric. Dec. 708 (1957). The only evidence it offered in support of its allegation is the "corrected" invoice it issued. However, such a self-serving document is insufficient to sustain its burden of proof. See *El Solo Packing Co. v. Ligon Produce Co.*, 17 Agric. Dec. 1002 (1958). Accordingly, we hold that the parties did not agree to compromise this matter.

The last issue we must consider is whether the complainant, by accepting the respondent's payment of \$5,760.86, entered into an

accord and satisfaction. Respondent, as the proponent of this allegation, had the burden of proving it. But it has failed to show that its check was offered and accepted in full satisfaction of the amount in dispute. Accordingly, we must hold that it has failed to sustain its burden of proof. *See Mendelson-Zeller v. Season Produce*, 31 Agric. Dec. 1288 (1972).

On the basis of the whole record, we find that respondent is obligated to complainant in the amount of \$2,849.49 with respect to the subject shipment and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant \$2,849.49, as reparation, plus interest at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ANTLE BROTHERS and TANIMURA BROTHERS d/b/a TANIMURA AND
ANTLE v. ALBERTSON'S, INC. PACA Docket No. 2-6989. Decided
December 8, 1986.

Broker's authority to invoice and collect—Failure to prove modification of understandings—Complaint dismissal.

Pursuant to the long-established custom of the parties and an invoice received from the broker who negotiated the sale, respondent buyer paid the broker for a trucklot of lettuce. The broker failed to remit the proceeds to complainant seller. Since complainant failed to prove the parties had agreed to change their customary practice authorizing the broker to invoice and collect, payment was made pursuant to the contract of the parties, and the complaint was dismissed.

Thomas Heinz, presiding officer.

Complainant, *pro se*.

Chip Cole, Boise, Idaho, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter "the Act". A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of \$2,298.20 in connection with the sale and shipment of a truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Both complainant and respondent submitted verified statements but neither submitted briefs.

FINDINGS OF FACT

1. Complainant, Antle Brothers and Tanimura Brothers, is a partnership doing business as Tanimura and Antle with a mailing address at P.O. Box 4070, Salinas, California 93912.

2. Respondent, Albertson's, is a corporation with its principal place of business at P. O. Box 20, Boise, Idaho 83786. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about June 25, 1984, respondent by oral contract purchased one trucklot of lettuce at an agreed price of \$2,293.20 from complainant.

4. The contract was negotiated by Stoops & Wilson, a broker in Shawnee Mission, Kansas, which is no longer in business.

5. Respondent accepted the lettuce upon arrival at Aurora, Colorado. Thereafter, Stoops and Wilson billed and collected for the lettuce from respondent but has failed to remit any part of the sale proceeds to complainant.

6. The complaint was filed within nine months after the cause of action accrued.

SUBSIDIARY FINDINGS OF FACT AND CONCLUSIONS

Both parties agree that before late spring or early summer of 1984 they had an established course of dealing authorizing Stoops and Wilson, a broker, to bill and collect for produce sold by complainant to respondent. Complainant contends, however, that because Stoops and Wilson's payment practices became very slow, this course of dealing was modified by an oral contract negotiated by unspecified individuals on an unspecified date during the late spring or early summer of 1984. By the terms of such oral contract, complainant asserts the parties all agreed that thereafter complainant would bill and collect directly from respondent and remit the collected brokerage commission to Stoops and Wilson. To sup-

port this contention, complainant submitted copies of documents showing complainant's sale of lettuce to respondent on June 23, 1984, (two days earlier than the disputed transaction) for which respondent paid complainant directly, even though the sale was negotiated by Stoops and Wilson.

Respondent, on the other hand, denies entering into any contract which modified the custom of the parties and argues, in effect, that the June 23, 1984 transaction was an anomaly which cannot be taken to prove an agreed-upon modification to the customary practice of the parties.

As the moving party, complainant has the burden of proving by a preponderance of evidence the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by complainant. *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, and cases cited at 535 (1975). Complainant has not met that burden.

The record reveals respondent paid Stoops and Wilson for the disputed lettuce pursuant to an invoice received from Stoops and Wilson which directed payment to Stoops and Wilson for the disputed lettuce as well as for other produce provided by a different supplier. Respondent claims it never received any invoice from complainant for the disputed lettuce, and complainant does not allege having sent one. Complainant relies entirely on respondent's direct payment to complainant for a different purchase through Stoops and Wilson on June 23 where complainant was the sole supplier. This constitutes the only evidence to support complainant's claim that the parties had agreed to change their long-standing practice permitting Stoops and Wilson to bill and collect. Absent corroborating evidence from disinterested sources or other documentary evidence, the mere fact that respondent paid complainant directly on one occasion does not persuade us that the parties had agreed to depart from past practice authorizing Stoops and Wilson to bill and collect from respondent for sales of complainant's produce to respondent. Since we find that respondent paid Stoops and Wilson for the disputed lettuce pursuant to a Stoops and Wilson invoice reflecting the contract of the parties, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.
Copies shall be served upon the parties.

HENRY AVOCADO PACKING CORP. v. RUSHTON & Co., INC. PACA
Docket No. 2-6998. Decided December 8, 1986.

Burden of proof—Damages—Breach of contract—Overseas shipments—Inspections—Reparation awarded—Counterclaim dismissed.

Where buyer fails to prove that precise quality standards were a part of the parties' contract and also failed to prove it was damaged, it has failed to sustain its burden of proving that it was damaged as a result of a breach of contract committed by seller.

Edward M. Silverstein, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Deborah Reid Kelley, Long Beach, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$13,094.92 in connection with two transactions, in foreign commerce, involving avocados, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim against complainant also in the amount of \$13,094.42 in connection with the same transactions as are made the subjects of the complaint.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, respondent filed a verified answering statement, and complainant also filed a verified statement in reply. In addition, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Henry Avocado Packing Corp., is a corporation whose mailing address is P.O. Box 27867, Escondido, California 92027.

2. Respondent, Rushton & Co., Inc., is a corporation whose mailing address is 11 Embarcadero West, Suite 230, Oakland, California 94607.

3. At all material times, complainant and respondent were licensed under the Act.

4. On June 11, and 12, 1984, in contemplation of foreign commerce, complainant, by oral contract, sold to respondent two container loads of Haas avocados, a perishable agricultural commodity, at f.o.b. prices, the contract destination being Packinghouse Escondido, California, as follows:

a. Container # SEAU 122289 contained 864 flats of size 24 at \$4.70 per flat (\$4,060.80), 864 flats of size 30 at \$4.50 per flat (\$3,888.00), and 864 flats of size 35 at \$4.10 per flat (\$3,542.40). Additional charges for this load were \$10.50 for a phytosanitary certificate, \$50.00 for an inspection, and \$35 each for two Ryan temperature recording devices (\$70.00). The total f.o.b. price for this container load was \$11,621.70.

b. Container # SEAU 122732 contained 1,296 flats of size 24 at \$4.70 per flat (\$6,091.20), and 1,296 flats of size 30 at \$4.50 per flat (\$5,832.00). Additional charges for this load were \$50.00 for an inspection, \$10.50 for a phytosanitary certificate, and \$35 each for two Ryan temperature recording devices (\$70.00). The total f.o.b. price for this container load was \$12,053.70.

5. Each of the container loads was the subject of a shipping point inspection which was restricted to condition only, and no condition defects were noted. As the inspection was restricted to condition only, the inspector did not note whether there were any quality defects apparent on the avocados.

6. Respondent received and accepted the avocados, which were then shipped to its customer in France. The shipments arrived in France on July 3, 1984. On July 4, 1984, the avocados in container # SEAU 122732 were inspected by Captain (Retired) J. J. Huni, Marine and General Goods Surveyor, 2 Rue J. J. Rousseau, F 92600 Asnieres. In his report, M. Huni noted as follows:

These fruits showed discolourations [sic], stains, and some slight genetics [sic] abnormalities. The buyer on the Rungis market is looking for monocoloured [sic] fruits, because the consumers in France willingly buy these, but only reluctantly the brownish, and stained ones.

It is the opinion of the undersigned Surveyor that the fruits are internally in a satisfactory condition, see in this respect our photographs on sheet 'D' hereafter, but the sales go by the external aspect and one must depend on a

The fruits [sic] were in general firm to very firm, with rough skin and presented stem-end very adherent but with old cut.

The stem-end showed a dry cut brown and woody. The cutting of the fruit showed a pulp with white color firm with adherent stone this fruit was difficult to cut and their pulp were health.

* * * * *

Conclusion:

In my opinion, after my checking and after the examination of the documents concerning this voyage, I estimate that the damages are due to:

. . . The quality of the fruit at departure, the pigmentation and brown spot noticed over the surface of the fruit during my checking, are characteristic of fruit with an advanced degree of cut, eg. stem-end woody and brown . . [sic] This fruit has been stored in gold [sic] store [sic] before their loading [sic] in container.

* * * * *

. . . The skin defects, green fruit with brown spots or burns at the stem end and apical surface involved a depreciation, that belongs to the quality of the fruit and their degree of cut.

. . . All these defects of quality have any relation with the condition of transport in SEA-LAND container [sic], which in fact can't receive any responsibility in these damages fixed [sic].

* * * * *

8. Respondent has paid complainant \$10,580.48 with respect to the two subject loads of avocados.

9. An informal complaint was filed on February 21, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

There is no dispute that respondent accepted the two container loads of avocados. Therefore, respondent is obligated to complainant for the full purchase price less any damages resulting from a

breach of contract committed by the complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proving such matters by a preponderance of the evidence. *The Growers-Shipper Pot. Co. v. Southw. Pro. Co.*, 28 Agric. Dec. 511 (1969).

Respondent has taken the position that neither of the container loads of avocados met "the kind, quality or size called for by the contract of sales." However, there is no evidence in the record as to the specific terms of sale relied upon by respondent to make this assertion. From the record, it would appear that respondent purchased two container loads of avocados suitable for export. It further appears that respondent got precisely that—two containers loads of avocados which were in a condition permitting their export. There is nothing in either of the French survey reports which would serve to dispute this conclusion. That the avocados were not of the precise quality desired by respondent is irrelevant as it does not appear that their quality was made a condition of their purchase and sale.¹

In view of this, we must conclude that respondent has failed to prove that complainant breached their contract by shipping avocados which were not of "the kind, quality or size called for by the contract of sale."

In any event, respondent has failed to prove it was damaged by the alleged breach. While it has asserted being damaged in the amount of \$6,000 with regard to the avocados in container #SEAU 122289 and in the amount of \$7,094.42 with regard to the avocados in container #SEAU 122732, it has offered no probative evidence whatsoever on this point. The only evidence on damage is the accounting done by M. Huni on the avocados in container #SEAU 122732 which shows that respondent's customer may have lost \$7,094.92 on this shipment. However, respondent has not shown how this relates to its alleged loss. Moreover, even if we assume that the customer deducted this loss from the respondent's sales price (\$20,282.40), respondent should still have received \$13,187.48 from the customer. This amount would still be \$1,133.78 more than the amount (\$12,053.70) it agreed to pay complainant for the avocados in this container. Under these circumstances, respondent could not, therefore, be said to have suffered a loss on this shipment.²

¹ It is noted that the shipping point inspection was limited to condition defects and therefore no quality defects which may have been present were noted.

² Special damages for loss of profit are not awardable when a buyer, as here, fails to show that the seller entered into their agreement with knowledge of the terms of the resale. *A. G. Shore Co. v. Conner Bros.*, 18 Agric. Dec. 1269 (1959).

Moreover, there is absolutely no evidence that either respondent or its French customer suffered a loss on the avocados in the second container #SEAU 122289.

In view of the above, we hold that respondent is liable to complainant for the full contract price for the two container loads of avocados, or \$23,675.40. As it has already paid complainant \$10,580.48, it remains obligated to complainant in the amount of \$13,094.92. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded. In view of the above, the respondent's counterclaim is dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$13,094.92 plus interest at the rate of 13 percent per annum from July 1, 1984, until paid.

Respondent's counterclaim is dismissed.

Copies of this order shall be served upon the parties.

NORDEN FRUIT CO. a/t/a CAL FRUIT v. SIGMA PRODUCE CO., INC.
PACA Docket No. 2-7012. Decided December 8, 1986.

Burden of proof—Acceptance after inspection waives warranties.

Buyer, who alleges that parties renegotiated price, has burden of proving such by a preponderance of evidence. Acceptance of produce after inspection waives warranties as to fitness.

Edward M. Silverstein, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leigh Larson, Nogales, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$5,776.00 in connection with one transaction, in interstate commerce, involving cucumbers, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount of damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement and respondent filed a verified answering statement. Each party also filed a brief.

FINDINGS OF FACT

1. Complainant, Norden Fruit Co., is a corporation also trading as Cal Fruit whose mailing address is P.O. Box 21394, Market Station, Los Angeles, California 90021.

2. Respondent, Sigma Produce Co., Inc., is a corporation whose mailing address is P.O. Box 1683, Nogales, Arizona 85621. At all material times, respondent was licensed under the Act.

3. On or about March 14, 1985, through Jose Gomez, Chula Vista, California, acting as a broker, complainant purchased a shipment of 360 crates of Alfa Brand cucumbers from respondent at an agreed f.o.b. price of \$12.00 per crate (\$4,320.00) plus 65 cents per crate for palletization and pre-cooling (\$234.00) for a total f.o.b. contract price of \$4,554.00. The cucumbers were shipped that same day.

4. Upon arrival of the cucumbers in California on March 15, 1985, complainant accepted them. At 10:25 a.m. of that day, the cucumbers were inspected. The inspector reported the condition of the cucumbers as follows: "Generally fresh and firm. Average 1% damage by sunken areas. From 18 to 36% average 28% damage by yellowing. Average 2% decay." The inspector further noted, as to grade, that the cucumbers met "quality requirements but [failed] to grade U.S. No. 1 only account condition."

5. Subsequent to the inspection, respondent contacted the broker to negotiate a settlement of the matter with the parties agreeing to a price of \$10.25 per carton for a total agreed f.o.b. price of \$3,924.00, or \$1.75 per carton less than the \$12.00 upon which the parties originally agreed. Respondent, on March 16, 1985, invoiced complainant pursuant to this modified agreement.

6. On March 21, 1985, the Agricultural Commissioner for Los Angeles County (California) issued a notice of noncompliance as to 261 cartons of cucumbers noting that the cucumbers exceeded the "legal tolerances for Mold & Decay 80-90%." These cartons were dumped.

7. On or about April 9, 1985, respondent received payment of its March 16, 1985, invoice. However, as complainant had not paid a related \$400 freight charge, respondent invoiced it for the \$400. Complainant also paid this invoice.

8. On April 19, 1985, complainant notified respondent and the broker, Jose Gomez as follows:

RE: SIGMA INVOICE #1814 OF 360 ALFA BRAND CUCUMBERS WE RECEIVED FROM SIGMA PRODUCE ON APRIL [SIC] 15, 1985. TO CONFIRM OUR TELEPHONE CONVERSATION WITH JOSE AT OTAY ON APRIL 19TH, OF [SIC] A PAYMENT OF \$3655.00 SHALL BE DEDUCTED FROM SIGMA. IN EVENT SIGMA DOES NOT SATISFY OBLIGATION, OTAY SHALL BE HELD LIABLE FOR FULL AMOUNT.

9. On or about May 16, 1985, complainant completed an account of sales for the subject shipment of cucumbers. According to the accounting, sales were not completed until that date. Complainant reported its accounting as follows:

29 @	\$12.00	\$348.00
14 @	10.50	147.00
2 @	10.00	20.00
36 @	4.00	144.00
15 @	3.00	45.00
<u>264</u> DUMPED		
360		<u>\$704.00</u>
Less 15% Com'n		\$105.60
Freight		400.00
Inspection		<u>35.00</u>
		<u>\$540.60</u>
	Total Due	\$163.40

10. The complaint was filed on August 28, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a shipment of cucumbers which complainant claims did not arrive in suitable condition. The parties agree that, after arrival, they renegotiated their contract. Respondent claims that it granted complainant a \$1.75 per carton allowance; com-

plainant claims that the parties agreed to a \$1.75 per carton price. It would have been helpful if one of the parties had included a statement from the broker through which all of their negotiation and renegotiation had taken place, or if such a statement had been included in the Department's report of investigation. However, we are forced to form our conclusions without that aid.

The complainant had the burden of proving, by a preponderance of the evidence, the allegations contained in the formal complaint. *Villareal v. Kellerman*, 25 Agric. Dec. 1399 (1966). It has failed to do so.

Complainant presented several different versions of the facts during the course of its presentation. In its formal complaint, it alleges the parties agreed to an f.o.b. price of \$10.25 per carton for the cucumbers. Then, after respondent alleged that the original price had been \$12.00 per carton and that this price was reduced to \$10.25 after arrival and acceptance of the cucumbers, complainant claimed that the parties had agreed, not to a \$1.75 per carton allowance, but to a price of \$1.75 per carton. In addition, some two months after acceptance of the cucumbers, complainant prepared an account of sales treating the shipment as a consignment sale. In point of fact, complainant has failed to show any consistency of position. Rather, it shows an attempt to formulate a theory to conveniently fit whatever facts respondent proved.

The preponderance of the evidence supports respondent's assertion that the parties renegotiated their contract and agreed to reduce the original \$12.00 price to \$10.25. This evidence consists of respondent's invoices, complainant's receipt thereof without protest, and complainant's payment thereof. As the parties renegotiated the contract after arrival of the cucumbers, the complainant, as the buyer, was liable to the respondent seller for the full agreed contract price. *Henson & Padgett Produce v. Ferrante*, 18 Agric. Dec. 1044 (1959). It has paid respondent this amount and it is not entitled to any damages. See *Max Feldbaum & Sons v. Alderiso*, 27 Agric. Dec. 763 (1968); acceptance of produce after inspection waives warranties as to fitness of produce.

In view of the above, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served on the parties.

MENDELSON-ZELLER Co., INC. v. VITA-WELLBROCK-KEARNEY, INC.
PACA Docket No. 2-7046. Decided December 8, 1986.

Burden of proving contractual relationship—Third-party relationships—Complaint dismissed.

Complainant failed to sustain its burden of proving that it had a contractual relationship with respondent, as the evidence clearly showed that the respondent received the peaches on consignment from another firm, which itself had purchased the peaches from complainant.

Andrew Stanton, presiding officer.

Complainant, *pro se*.

Frederick C. Stern, New York, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$8,025.90 in connection with a truckload of peaches allegedly sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure set forth in section 47.20 of the Department's Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not a sworn statement by an employee of respondent, is not considered part of the evidence. The parties were given the opportunity to submit additional documents in the form of verified statements and to file briefs. Respondent submitted an answering statement and complainant a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Vita-Wellbrock-Kearney, Inc., is a corporation whose address is 223-225 New York City Terminal Market, New York, New York. At the time of the transactions alleged herein, respondent was licensed under the Act.

3. On approximately August 11, 1984, John Cribb, an employee of Troy H. Cribb & Sons, Inc., Spartanburg, South Carolina (herein-

after "Cribb"), ordered from complainant a truckload of peaches for \$15,525.90, for Cribb's account, with shipment to be made to respondent. Cribb was not brokering a sale for complainant to respondent but was purchasing the peaches on its own behalf. Cribb never prepared a memorandum of sale for this transaction. Cribb consigned the peaches to respondent and sent respondent an invoice reflecting the consignment. Respondent received and accepted the peaches, and sold them for Cribb's account.

4. On August 15, 1984, complainant prepared an invoice showing the sale of the peaches to respondent, and sent the invoice to respondent. Upon receipt of the invoice, respondent contacted John Cribb, who acknowledged that it was Cribb's responsibility, and asked that respondent send the invoice to Cribb.

5. Respondent sold the peaches and credited Cribb's account with the net proceeds. Cribb prepared a check to complainant on September 25, 1984, for the full purchase price of the peaches, \$15,525.90, and sent it to complainant, but the check was returned unpaid due to insufficient funds. Cribb has since paid complainant \$7,500.00.

6. A formal complaint was filed on February 4, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

The issue which must be resolved is whether the truckload of peaches was purchased from complainant by respondent, as complainant alleges, or by Troy H. Cribb & Sons, Inc., Spartanburg, South Carolina, with shipment to respondent, which is claimed by respondent. Complainant has the burden of proving the existence of this alleged contractual relationship with respondent. *Cook Sales Company v. Romney Produce Co.*, 42 Agric. Dec. 641 (1983).

The only evidence offered by complainant in support of its position, other than the allegations in its sworn complaint, is an August 15, 1984, invoice to respondent, which complainant asserts was received without objection. Respondent's position is strongly supported by a sworn statement by John Cribb, who personally negotiated the transaction. Mr. Cribb states that he ordered the produce on behalf of Troy H. Cribb & Sons, Inc. with delivery to respondent, to whom Cribb had consigned the peaches. He denies complainant's allegation in its complaint that Cribb acted as the broker in the transaction. The veracity of this statement is supported by Cribb's invoice to respondent showing the consignment (Finding of Fact 3). It is also quite significant that Cribb never performed one of the primary duties of a broker, the preparation of a memo-

randum of sale (Finding of Fact 3). Further, all payments to complainant for the peaches were from Cribb, not respondent (Finding of Fact 5). In view of all these factors, it is apparent that respondent did not purchase the peaches from complainant, but merely received them on consignment from Cribb, the actual purchaser. Therefore, we conclude that complainant has failed to sustain its burden of proving any contractual relationship with respondent. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GARDEN STATE FARMS, INC. v. INTERNATIONAL A. G., INC. PACA
Docket No. 2-7285. Decided December 15, 1986.

Dennis Becker, presiding officer.

Complainant, *pro se*.

C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$19,600.00 in connection with shipments of pineapples in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint. Said answer disputed, however, the amount in contention claiming that the amount owed to complainant was \$10,290.00. Complainant was given an opportunity to dispute the fact that the outstanding balance owed to it was \$10,290.00. Complainant did not dispute this fact. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Garden State Farms, Inc., is a corporation whose address is 3655 S. Lawrence Street, Philadelphia, Pennsylvania 19148. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$10,290.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$10,290.00, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

SOUTHLAND PRODUCE COMPANY a/t/a WESTERN FRUIT SALES Co. v.
INTERNATIONAL A. G., INC. PACA Docket No. 2-7315. Decided
December 15, 1986.

Dennis Becker, presiding officer.

Complainant, *pro se*.

C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$9,138.75 in connection with shipments of oranges in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto. Such answer did not deny liability and respondent was given an opportunity to so deny. Respondent has not denied liability. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Southland Produce Company, a/t/a Western Fruit Sales Co., is a corporation whose address is P. O. Box 21037, Los Angeles, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$9,138.75. Accordingly, within 30 days from the date of this

order, respondent shall pay to complainant, as reparation, \$9,138.75, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

EDWIN PELLETIER & SONS, INC. v. JOHN A. PIRRELLO CO., INC. PACA
Docket No. 2-7336. Decided December 15, 1986.

Dennis Becker, presiding officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$72,081.22 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Edwin Pelletier & Sons, Inc., is a corporation whose address is P. O. Box 133, Frenchville, Maine 04745. Respondent, John A. Pirrello Co., Inc., is a corporation whose address is P. O. Box 70067 Brightwood Station, Springfield, Massachusetts 01107. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$72,081.22. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$72,081.22, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

RAWLAND F. TAPLETT d/b/a R.F. TAPLETT FRUIT & COLD STORAGE v.
PREMIUM PACKING & STORAGE, INC. PACA Docket No. 2-6871.
Decided December 17, 1986.

Contract—Jurisdiction—Interstate commerce—Complaint dismissed.

Complainant agreed to contract whereby respondent would pack complainant's cherries and complainant would be responsible for marketing the cherries. It was held that this type of contract did not constitute a transaction within the meaning of section 2 of the Act and that the Secretary therefore lacked jurisdiction over such contract. The parties later agreed that culls and briner cherries were sold by respondent for complainant's account, but it was found that complainant had failed to show by a preponderance of evidence that such cherries were sold in interstate commerce. Complainant additionally alleged that a substantial poundage of cherries were received but not accounted for by respondent and that such cherries must have been sold in interstate commerce because most cherry sales are interstate. It was found that complainant failed to meet its burden of proving by a preponderance of evidence that the allegedly unaccounted for cherries were sold in interstate commerce. The complaint was dismissed for want of jurisdiction.

George S. Whitten, presiding officer.

Complainant, *pro se*.

Patrick Andreotile, Yakima, Washington, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$183,519.84 in connection with the delivery of numerous loads of cherries to respondent for packing.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds \$15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

term "transaction" as it is used in section 2 of the Act (7 U.S.C. § 499b). See *Anonymous*, 4 Agric. Dec. 332 (1945).

It is also clear that respondent did sell culls and briners belonging to complainant for complainant's account, and that at least part of these sales were orally authorized by complainant, without, however, any reference in such oral authorizations to sale of the produce outside the state. Respondent asserts in its sworn answer that these culls and briners were sold to Mojonner & Sons, Inc. in Sunny Side, Washington, and did not move in interstate commerce. Complainant has presented us with no evidence which would show that the culls and briners were sold in interstate commerce, or that such was contemplated within the meaning of the Act and we must conclude that we have no jurisdiction to adjudicate any matters relative to such cherries. See *Mendelson-Zeller Co. v. Bleir*, 34 Agric. Dec. 683 (1975).

Complainant also asserts that the records furnished by respondent to complainant, when compared with delivery receipts, demonstrate that out of all the cherries received by respondent, 107,774 pounds of Bing cherries, 12,351 pounds of Chinook cherries, 2,141 pounds of Burlatt cherries, 29,004 pounds of Lambert cherries, and 3,580 pounds of Van cherries were missing or unaccounted for by respondent. Complainant asserts that respondent must have sold these cherries, and has simply refused to disclose such sales to complainant. Complainant also asserts that most cherry sales are in interstate commerce, and that consequently such cherries must have been sold in interstate commerce. It is well established that the burden is upon a claimant in a reparation proceeding to prove interstate commerce or contemplation thereof. See *Wright Supply Corporation v. Carpenter Marketing, Inc.*, 38 Agric. Dec. 1641 (1979) and *S. Walter Market Credit v. Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1186 (1969). Complainant's speculation that the cherries, if diverted by respondent, were sold in interstate commerce, is not sufficient proof of interstate commerce. In an effort to show that "the ultimate destination of packed and processed cherries normally involves interstate shipment" complainant submitted a number of invoices covering its own cherries which were shipped interstate. However, among another group of invoices covering complainant's cherries were at least six covering shipments of cherries intrastate. We conclude that complainant has failed to establish the required interstate commerce in connection with these cherries which it alleges respondent in some way disposed of without authorization. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

**BIANCHI & SONS PACKING CO. v. TOM LANGE CO., INC. and/or
MARTIN MONTES d/b/a M&M PRODUCE BROKERAGE. PACA
Docket No. 2-6943. Decided December 17, 1986.**

Contracts—Payment.

Respondent Montes represented himself to complainant as a broker in negotiating a contract of sale from complainant to respondent Lange. Respondent Lange was led to believe by Montes that the sale was made by Montes. Upon receipt of an invoice from complainant, Lange called and received permission from complainant's office manager to pay the invoice of Montes. It was held that no contract was formed between complainant and Lange, that complainant was bound by the permission given by its office manager in spite of Lange's notice of complainant's possible interest, and that Montes should pay complainant reparation.

George S. Whitten, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$4,561.20 in connection with the shipment in interstate commerce of a truck lot of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondents, and respondent Tom Lange Co., Inc., filed an answer thereto denying liability to complainant. Respondent Martin Montes d/b/a M&M Produce Brokerage did not file an answer and was deemed to be in default.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent Tom Lange,

Co., Inc., filed an answering statement, and complainant filed a statement in reply. Complainant also, filed a brief.

FINDINGS OF FACT

1. Complainant, Bianchi & Sons Packing Co., is a corporation whose address P.O. Box 190, Merced, California.

2. Respondent, Tom Lange Co., Inc., (hereinafter Lange) is a corporation whose address is P.O. Box 4701, Springfield, Illinois. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent Martin Montes (hereinafter Montes) is an individual doing business as M & M Produce Brokerage whose address is 43 Dolores Street, Watsonville, California. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On October 19, 1984, complainant was contacted by respondent Montes, who represented himself to be acting as a broker, and who secured complainant's agreement to sell to respondent Lange 288 25 pound cartons of extra large "Jana Pink" tomatoes at \$8.00 per carton, and 360 25 pound cartons of large "Jana Pink" tomatoes at \$6.00 per carton, plus \$.15 per carton for palletizing, or a total of \$4,561.20, f.o.b.

5. On October 19, 1984, the tomatoes were shipped from loading point in California by truck.

6. On October 19, 1984, respondent Lange contacted respondent Montes to purchase a truckload of tomatoes from such respondent. Respondent Montes agreed to sell to respondent Lange a truckload of tomatoes to contain 432 cartons of extra large U.S. No. 1 grade tomatoes, No. 2 to No. 3 color, at \$8.35 cents per carton, and 360 cartons of large tomatoes at \$6.35 per carton, f.o.b., joint account above the specified prices.

7. On October 19, 1984, respondent Montes added 144 cartons of extra large tomatoes to the truck destined to respondent Lange and issued a "standard confirmation of sale" under its own letter head covering the total of 792 cartons of tomatoes. The confirmation of sale showed that the tomatoes were "sold for account of M & M Produce Brokerage" and also stated "joint account sale." The confirmation also included the additional instructions that the purchase price plus profits were to be remitted to M & M Produce Brokerage. Respondent Lange received this confirmation of sale on October 25, 1984. Respondent Lange accepted the tomatoes on arrival and determined that the 144 cartons of extra large tomatoes added by respondent Montes contained excessive condition defects. Respondent Lange contacted respondent Montes and negotiated a

\$3.00 per carton allowance as to the 144 cartons of extra large tomatoes.

8. On November 5, 1984, respondent Lange received complainant's invoice. Respondent Lange's branch manager in Dallas, Texas, Greg Gust, who had conducted all of the negotiations on behalf of respondent Lange, placed a telephone call to complainant's office in California at 4:30 p.m. on November 5, 1984, and asked to talk to Mr. Bianchi. Mr. Gust was advised by Carol Krumm, office manager of Bianchi & Sons Packing Company, in Merced, California that Mr. Bianchi was not in the office, and asked if she could be of assistance. Mr. Gust identified himself and his company and told Ms. Krumm that he had received invoices both from Bianchi and from M & M Produce Brokerage. After a discussion of the situation Ms. Krumm agreed that Lange should make payment to respondent Montes.

9. Respondent Lange has paid respondent Montes for the 648 cartons of tomatoes covered by the formal complaint in an amount which exceeds the amount claimed in the formal complaint. Respondent Montes has not paid complainant any amount for the tomatoes.

10. An informal complaint was filed on February 5, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

It is clear from the record in this case that complainant had no contact with respondent Lange prior to such respondent receiving complainant's invoice on November 5, 1984. While complainant believed, on the basis of the misrepresentation of respondent Montes, that it was entering into a contract with respondent Lange, we do not believe that the evidence of record shows that a contractual relationship ever existed between complainant and respondent Lange. There was no mutuality between the parties concerning the terms of sale, and respondent Lange did not believe that it was contracting with complainant. See *Anonymous*, 8 Agric. Dec. 374 (1949).

Respondent Lange had notice of complainant's possible interest in the tomatoes prior to its making payment to respondent Montes. Respondent Lange contends that upon receipt of such notice in the form of the invoice of complainant its Greg Gust immediately telephoned complainant and secured the permission of complainant's Carol Krumm to pay the invoice of respondent Montes. This was asserted during the informal stages of this proceeding by respondent Lange and was again asserted in respondent Lange's answer. In the opening statement complainant's vice president, G. John Bian-

chi, Jr. referred to respondent Lange's allegation concerning the conversation with Carol Krumm and stated as follows:

This conversation would have taken place without my knowledge and certainly would not constitute any agreement by Bianchi & Sons Packing Co. as Ms. Krumm would not be in the position of authority to authorize remittance to M & M Produce Brokerage. Why Mr. Gust would not communicate with me (a person in authority) is beyond my knowledge but I must reemphasize that certainly no one in Bianchi & Sons Packing Co. ever authorized payment to be directed to M & M Produce Brokerage.

Respondent Lange in its answering statement submitted the affidavit of Greg Gust in which it was again affirmed that the conversation with Carol Krumm had taken place. In addition, Mr. Gust submitted as an exhibit to the answering statement a copy of Bianchi's invoice which contains the handwritten and dated note reflecting Mr. Gust's agreement with Carol Krumm. Complainant's statement in reply consists of a lengthy affidavit by Carol Krumm admitting to the conversation of November 5, 1984, but denying that she ever gave consent for respondent Lange to pay the invoice of Martin Montes. Carol Krumm stated in part as follows:

. . . Mr. Gust states that he spoke with me on November 5, 1984, at approximately 4:30 in the afternoon. Mr. Gust is correct in this statement. Apparently, Mr. Gust was telephoning for Mr. Bianchi to discuss the transaction covered by these proceedings. As Mr. Bianchi was not available, I told Mr. Gust that I would be more than happy to take a message for Mr. Bianchi. Mr. Gust asked if Bianchi & Sons Packing Co. could bill M & M Produce Brokerage for the load of tomatoes in question. I advised Mr. Gust that I would give this message to Mr. Bianchi, however, at no time did I ever agree that M & M Produce Brokerage should bill Tom Lange Co. direct and that Bianchi & Sons Packing Co. should bill M & M Produce direct for this shipment. I advised Mr. Gust that Mr. Bianchi would have to make the decision in regard to this matter and that I had no authority to make any type of commitment one way or the other . . .

Although Mr. Bianchi had earlier wondered "why Mr. Gust would not communicate with me . . ." no explanation was given to complainant as to why, if Carol Krumm's version of the conversation is correct, Mr. Bianchi never returned the call of Mr. Gust. On

the whole, we find that Mr. Gust's account of the conversation with Carol Krumm is the more plausible and we have found as a matter of fact that Mr. Gust's version of the conversation is what occurred. Mr. Bianchi's protest that the office manager of Bianchi & Sons did not possess adequate authority to enter into the agreement that respondent Lange should pay the invoice of Montes cannot be accepted. Carol Krumm was complainant's employee, answered complainant's telephone, and undertook to make the agreement with Mr. Gust whereby respondent Lange was allowed to pay the invoice of Montes. We find that Carol Krumm had apparent authority to authorize payment to Montes. The complaint as to respondent Lange should be dismissed.

Respondent Montes clearly received funds which should have been forwarded to complainant. This respondent has not forwarded such funds to complainant, and its failure to do so is a violation of the Act for which reparation should be awarded to complainant with interest.

ORDER

The complaint as against respondent Tom Lange Co., Inc., is dismissed.

Within thirty days from the date of this order, respondent Martin Montes doing business as M & M Produce Brokers, shall pay to complainant, as reparation, \$4,561.20 with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. v. FOUR C'S PACKING COMPANY. PACA
Docket No. 2-7002. Decided December 17, 1986.

Evidence—Unverified pleadings under shortened procedure.

Due to respondent's failure to submit a verified answer there was no evidence in the record to support its contention that cucumbers were sold at a lower price than that billed by complainant.

George S. Whitten, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$2,597.50 in connection with the shipment in foreign or interstate commerce of truck lot and a truckload of cucumbers. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of \$2,001.50 and denying liability to complainant for the remaining \$596.00. On January 17, 1986, an order was issued requiring respondent to pay complainant \$2,001.50 as an undisputed amount.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case, as is the Department's report of investigation. Respondent's answer was not verified and is therefore not considered a part of the evidence in this proceeding. See 7 CFR § 47.20(a). In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

2. Respondent, Four C's Packing Co., is a partnership composed of Charles L. Cacho, Hellen O. Cacho, Louis J. Cacho, and Richard A. Cacho, whose address is P.O. Box 3278, Chula Vista, California. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about March 6, 1985, complainant sold to respondent one lot consisting of 72 wire bound crates of select cucumbers which had been received by complainant on March 4, 1985, from Mexico. The price of the cucumbers was \$6.00 per crate, plus \$.65 for palletizing and cooling, or a total of \$478.80. Respondent picked

up the cucumbers in its own truck at complainant's place of business on March 6, 1985.

4. On or about April 8, 1985, complainant sold to respondent 596 crates of super select cucumbers at \$12.50 per crate, and 224 crates of select cucumbers at \$7.50 per crate, plus \$22.50 for a Ryan temperature recorder, or a total of \$9,152.50. The cucumbers were shipped on or about April 8, 1985, from Florida to respondent's place of business in Chula Vista, California in a truck hired by respondent.

5. On May 18, 1985, respondent sent complainant a check in the amount of \$7,033.80 for the two cucumber transactions. This check was later released by respondent as an undisputed amount.

6. The formal complaint was filed on May 24, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent in its unsworn answer admitted liability for \$2,001.50 of the remaining \$2,597.50 alleged due by complainant. Respondent's defense in regard to the remaining \$596.00 consisted of the allegation that the 596 crates of super select cucumbers sold on April 8, 1985, were sold at \$11.50 rather than the \$12.50 figure alleged by complainant. Since respondent's answer was not verified there is no evidence in the records supporting respondent's contention. *Perrell, Inc. v. Anthony Abbate Fruit Distributors*, 32 Agric. Dec. 1900 (1973). On the other hand, complainant's sworn complaint alleges that the sale price of the 596 crates of cucumbers was \$12.50, and complainant attached a copy of the invoice to its sworn complaint showing that the 596 cartons of cucumbers were billed at \$12.50 to respondent. We conclude the sale price was \$12.50, and that there remains due and owing from respondent to complainant the sum of \$596.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$596.00, with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CARLSBAD PRODUCE, INC. v. CALIFORNIA PRODUCE DISTRIBUTORS, INC.
PACA Docket No. 2-7021. Decided December 17, 1986.

Warranty of suitable shipping condition—Breach of contract—Rejection with reasonable cause—Complaint dismissed.

Complainant has the burden to prove by a preponderance of evidence the allegations of its complaint and failed to meet its burden in this case. It alleges that the respondent is liable for the balance of the purchase price in part due to a breach of the warranty of suitable shipping condition and because the tomatoes provided were in conformity with the contract terms. Where the normality of the transportation service and conditions are challenged, the burden of proof rests upon the party seeking the benefit and the complainant failed to submit such evidence. Accordingly, the complaint is dismissed.

Sharlene W. Lassiter, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). The complainant timely filed a formal complaint in which the complainant sought an award of reparation against respondent in the amount of \$5,487.30 in connection with a shipment of tomatoes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability.

Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a brief. Respondent filed a response to complainant's opening statement but did not file a brief.

FINDINGS OF FACT

1. Complainant, Carlsbad Produce, Inc., hereinafter referred to as Carlsbad, is a corporation whose mailing address is 6150 Yarrow Drive, Suite D, Carlsbad, California 92008. At the time of the transaction involved herein, Carlsbad was licensed under the Act.

2. Respondent, California Produce Distributors, Inc., hereinafter referred to as California Produce, is a corporation whose mailing address is 751 Merchant Street, Los Angeles, California 90021. At the time of the transaction involved herein, California Produce was licensed under the Act.

3. On or about January 23, 1985, Carlsbad sold to California Produce, 594 flats of 4×5 Tomatoes and 990 flats of 5×5 Tomatoes \$7.65 per flat, plus \$22.50 for a Ryan Recorder tape, total f.o.b. price of \$12,140.10, 2 Breaker to 3 Turning color in transit, based on the color classifications set forth in 7 CFR § 51.1860, pursuant to an oral contract negotiated by Wayne Nakaji for Carlsbad and Gene Wyche for California Produce.

4. On January 24, 1985, Carlsbad shipped the truckload of tomatoes from Nogales, Arizona to American Tomatoes Distributing Inc., Miami, Florida, hereinafter referred to as American Tomatoes.

5. American Tomatoes received the truckload of tomatoes on January 29, 1985.

6. Without unloading the tomatoes, American Tomatoes obtained a federal inspection of the tomatoes on January 29, 1985, at 7:45 a.m., which rated the temperature and condition of the tomatoes, in pertinent part, as follows:

Temperature Range:	45°F
Condition:	Average approximately 30% Turning to Pink. 70% Light Red to Red. 1% Decay.

7. American Tomatoes and California Produce rejected the truckload of tomatoes on January 29, 1985.

8. California Produce gave timely notice of rejection to Carlsbad on January 29, 1985.

9. At the instruction of the Los Angeles office of the Perishable Agricultural Commodities Act Division, United States Department of Agriculture, American Tomatoes unloaded the tomatoes and obtained a second, post-rejection, federal inspection of the tomatoes on January 30, 1985, at 10:45 a.m., which rated the temperature and condition of the tomatoes, in pertinent part, as follows:

Temperature Range:	44°, 47°, 52°, 54°F
Condition:	Average approximately 5% Breakers 30% Turning to Pink 60% Light Red to Red 4% Decay

Average 5% damage by sunken discolored area, generally occurring over shoulders.

10. The condition of the tomatoes after each inspection was within the range of tolerance for grade U.S. No. 1 as prescribed in 7 CFR § 51.1861(a)(2).

11. American Tomatoes sold the tomatoes for the account of Carlsbad.

12. California Produce remitted \$6,652.80 to Carlsbad for the truckload of tomatoes.

13. Carlsbad filed a formal complaint on September 16, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This proceeding involves the purchase of 1584 flats of tomatoes by California Produce from Carlsbad and shipped to American Tomatoes, f.o.b. Miami, Florida. We resolve this case in favor of California Produce on the basis of the warranty of suitable shipping condition, breach of contract and rejection with reasonable cause. There is no dispute that there was an oral contract to purchase 1584 flats of tomatoes between the parties. Also, the statements submitted by both parties dispositively show that California Produce requested tomatoes of 2 Breaker to 3 Turning color, based on the color classifications set forth in 7 CFR § 51.1860.

As the moving party, Carlsbad has the burden to prove by a preponderance of the evidence the affirmative allegations of its complaint. *New York v. Sandler*, 32 Agric. Dec. 702, 705 (1973). Carlsbad did not meet its burden in this case. Essentially, Carlsbad alleges that California Produce is liable for the balance of the purchase price in part due to a breach of the warranty of suitable shipping condition and because the tomatoes provided by Carlsbad were in conformity with the contract terms. In an f.o.b sale such as this one, California Produce assumes all risk of loss due to transportation service and conditions (e.g., abnormal temperatures), while Carlsbad is liable for any abnormal deterioration at the contract destination point if the commodity is handled under normal transportation service and conditions. This is the warranty of suitable shipping conditions which Carlsbad seeks to apply to California Produce. *Wolf v. Mendelson-Zeller Co.*, 34 Agric. Dec. 690, 693 (1975).

The transportation services and temperature conditions provided here were normal. Carlsbad questions the pulp temperatures noted on the federal inspection certificates as indicative of abnormal temperature conditions in transit, and therefore the reason for the advanced color of the tomatoes on arrival. Where the normality of the transportation service and conditions are challenged, the burden of proof rests upon the party seeking the benefit of this part of the warranty, Carlsbad here. *Valley Packing Co. v. Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352, 1356 (1969). Nevertheless, Carlsbad submitted no evidence to prove abnormal temperatures in transit.

The Department's publication *Protecting Perishable Foods During Transport by Motor Truck*, Agriculture Handbook No. 105, states relative to the tomatoes here that desired transit temperatures should be between 45° and 50°F. The Handbook also states that the shipping temperature maintained in transit depends on the number of days required for transportation and the percentage of ripening desired by the receiver. The rate of ripening of the tomatoes in transit is further retarded by lower temperatures not less than 41°F. *D'Arrigo Bros. Co. of California v. Colonial Stores*, 42 Agric. Dec. 173, 176 (1983). The federal inspection on the date of arrival shows a pulp temperature of 45° with 1% decay. Without any evidence to the contrary, we find no abnormal temperatures in transit. The pulp temperature indicates an in transit temperature low enough to retard advancing color changes beyond a 2 to 3 color during the journey. Accordingly, Carlsbad did not prove that transportation was not normal due to the temperature conditions in transit associated with the warranty of suitable shipping condition.

Finally, Carlsbad did not prove that the tomatoes provided were in conformity with the contract term requesting tomatoes of 2 to 3 color. Carlsbad did not submit any evidence to show that it loaded tomatoes of 2 to 3 color in Nogales, Arizona, in accordance with the contract requirement. Also, while it is true that the federal inspection report taken on arrival shows that the tomatoes were within the range of tolerance for U.S. No. 1 grade fresh tomatoes, the percentage of advanced ripening color far exceeded the color specified in the contract, which constitutes a breach of contract. *Pacific Farm Co. v. Bisese and Console, Inc.*, 33 Agric. Dec. 1839, 1841. Therefore, California Produce properly rejected the tomatoes shipped by Carlsbad. California Produce is not responsible to Carlsbad for any of the purchase price. American Tomatoes disposed of the tomatoes for the account of Carlsbad and submitted an account of sale to California Produce. California Produce remitted \$6,652.80 to Carlsbad for the tomatoes. Carlsbad submitted its invoice on

which \$6,652.80 appears with the words "claim settlement—released on undisputed amount" and with the original invoice price deleted. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANK S. ECKEL, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7026. Decided December 17, 1986.

Accord and Satisfaction.

Where a good faith dispute existed between the parties in regard to the amount due, and respondent paid a lesser amount than that invoiced by means of a check with an accompanying stub which referenced the relevant invoices and stated "paid in full per att letter & inspection", complainant's negotiation of the check resulted in an accord and satisfaction.

George S. Whitten, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$9,811.85 in connection with the shipment in interstate commerce of two truckloads of mixed produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Frank S. Eckel III and William R. Sherer, doing business as Skip's Consolidation, whose address is P.O. Box 3947, Salinas, California.

2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P.O. Box 7364, Boise, Idaho. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about January 16, 1985, complainant sold to respondent under its invoice No. 5744, and shipped from loading point in California to respondent in Boise, Idaho, one truckload of mixed perishable produce which contained, in addition to numerous other items, 330 cartons of lettuce which were sold at a price of \$2,515.50. The total price for the truckload of mixed produce was \$7,308.10, f.o.b.

4. On or about January 31, 1985, complainant sold to respondent under its invoice No. 5808, and shipped from loading point in California to respondent in Boise, Idaho one partial truckload of mixed produce having a total invoice price of \$2,503.75, f.o.b. This produce was accepted by respondent without complaint, and complainant has been paid in full for such produce.

5. The mixed truckload of produce shipped on January 16, 1985, arrived in Boise, Idaho on Saturday, January 19, 1985. Respondent called complainant at that time and informed complainant that the 330 cartons of lettuce arrived showing damage due to field freeze. Respondent also informed complainant that an inspection would be called for but was not yet available since the lettuce arrived on the weekend. On Monday, January 21, 1985, respondent attempted to secure federal inspection and was informed that inspection would not be available until Tuesday. Respondent so informed complainant on Monday. On Tuesday, January 22, 1985, at 9 a.m., the lettuce was federally inspected while stacked on pallets at respondent's place of business. The temperature was shown to be 36° to 38°F. Condition was stated to be as follows:

Wrapper leaves: Average 8% damage by Light brown to brown discoloration affecting 2 to 5 leaves. No decay.

Head Leaves: 22 Heads per carton average 88% damage by feathering and peeling affecting 4 to 7 outer head leaves.
No decay.

On January 23, 1985, respondent sent complainant the following telegram:

AS TO OUR FIRST PHONE CONVERSATION ON LATE
SATURDAY EVENING 1-19-85 ARRIVAL TRUCK PER

YOUR INSTRUCTIONS WE UNLOADED LETTUCE WHICH HAD SIGNIFICANT VISUAL DAMAGE. WE INFORMED YOU THEN THE EARLIEST INSPECTION WOULD BE MONDAY 1/21/85 AS WE COULD NOT CONTACT INSPECTION SERVICE SATURDAY OR SUNDAY. INSPECTION SERVICE NOTIFIED US ON MONDAY THE EARLIEST WOULD BE TUESDAY WE NOTIFIED YOU MONDAY INSPECTION WOULD BE TUESDAY ALSO STATED SATURDAY THAT WE WANTED A REPLACEMENT OF DAMAGED LETTUCE. WE AGREE TO TAKE DAMAGED LOAD OF LETTUCE ON CONSIGNMENT ONLY, AND OUR ORIGINAL LOAD OF LETTUCE TO BE REPLACED. AS PER OUR CONVERSATION OF TUESDAY LATE AFTERNOON, AFTER WE CONFIRMED SIGNIFICANT DAMAGE YOU WERE AGAIN INFORMED OF OUR ORIGINAL DEMAND OF REPLACEMENT OF US #1 QUALITY LETTUCE. AT THIS TIME WE ARE HEREBY MAKING A DEMAND OF THE REPLACEMENT IN A REASONABLE PERIOD OF TIME WITHIN 7 DAYS. IF OUR DEMAND IS NOT MET WE WILL HAVE NO ALTERNATIVE BUT TO BUY AGAINST YOUR ACCOUNT

On the following day, January 24, 1985, complainant replied to the above telegram as follows:

TO WEINSTEIN PRODUCE SALES, INC. IN REPLY TO
YOUR WESTERN UNION MESSAGE OF 1-23-85

DEAR SIR

BE ADVISED THAT OUR PURCHASE OF LETTUCE CARTONS NUMBER 330 OF SNAPPY BRAND LETTUCE BOUGHT ON YOUR BEHALF ON 1-18-85 THIS LETTUCE WAS BOUGHT ON GOOD DELIVERY STANDARDS THAT WE DID NOT QUOTE IMPLY OR GUARANTEE US #1 LETTUCE ON ARRIVAL CONFIRMING YOUR ADVISING US OF INSPECTION ON PROBLEMS AT 5:50 P.M. JANUARY 19 1985 WE WERE FIRST MADE AWARE OF THE PROBLEM AT AN EARLIER TIME FROM JACK T BALLIE COMPANY THROUGH THE LETTUCE BROKER SINCE WE LEARNED SECOND HAND OF A LIKELY PROBLEM THROUGH THE LETTUCE BROKER FROM THE SHIPPER WHO YOU HAD TALKED TO EARLIER SATURDAY 1-19-85 YOU ADVISED US THAT YOU WERE

GOING TO TAKE INSPECTION AND UNLOAD THE TRUCK AND WAIT FOR GOVERNMENT INSPECTION ON MONDAY 1-21-85 MONDAY A.M. YOU INFORMED SKIPS CONSOLIDATION THAT AN INSPECTOR WOULD NOT BE AVAILABLE TILL TUESDAY A.M. WE IN TURN NOTIFIED THE LETTUCE BROKER AT NO TIME ON SATURDAY 1-19-85 WAS THERE CONVERSATION WITH WEINSTEIN PRODUCE TO SKIPS CONSOLIDATION ABOUT REPLACEMENT OF LETTUCE NO MENTION OF CONSIGNMENT WAS DIRECTED OR IMPLIED FROM WEINSTEIN PRODUCE TO SKIPS CONSOLIDATION ABOUT THE LETTUCE LOAD THAT ARRIVED 1-19-85 AT THIS TIME WE CANNOT ACCEPT YOUR DEMAND FOR REPLACEMENT OF LETTUCE INSPECTION WAS REPORTED TO SHIPPER ON TUESDAY 1-22-85 WEINSTEIN PRODUCE REPORTED TO SKIPS CONSOLIDATION THAT HE WOULD GET BACK TO SKIPS CONSOLIDATION ON 1-25-85 AND REPORT DAMAGES AT NO TIME DID SKIPS CONSOLIDATION EVER AUTHORIZE YOU TO BUY AGAINST SKIPS CONSOLIDATION CONTRACT SKIPS CONSOLIDATION EXPECTING DETAILED ACCOUNT AND NET PROCEEDS ALONG WITH USDA INSPECTION

6. On or about August 22, 1985, respondent sent complainant a check in the amount of \$7,579.25. Attached to the check was the following statement:

INVOICE #5808 2,503.75

#5744 5,075.50

paid in full per att letter & inspection

Attached to the check was an accounting under the letterhead of respondent covering the 330 cartons of lettuce. Such accounting showed gross proceeds in the amount of \$1,497.90, freight at \$495.00, and warehousing and selling fees at \$2.25 per carton, or \$742.50, leaving net proceeds of \$260.40.

7. The formal complaint was filed on July 15, 1985, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Respondent in its answer asserts that its payment to complainant dated August 22, 1985, was tendered as payment in full, and

that it does not owe complainant any balance since the check was cashed by complainant as payment in full. Complainant did not address this crucial allegation in either its opening statement or its brief. The exchange of telegrams between complainant and respondent following respondent's acceptance of the produce and the subsequent filing of an informal and formal complaint by complainant make it abundantly clear that there was a bona-fide dispute between the parties prior to complainant's negotiation of the check tendered by respondent. The accounting, in the form of a letter attached to the check and statement, made clear the basis on which respondent was tendering a lesser amount than the amount invoiced as payment in full. We have held many times that where there is a bona-fide dispute between the buyer and seller as to the amount due for produce sold, and the buyer sends the seller a check for less than the contract price marked "payment in full" or other words clearly indicating that the check is tendered in full settlement, the acceptance of such check constitutes an accord and satisfaction. See *Kelman Farms v. Bushman Brokerage*, 34 Agric. Dec. 1146 (1975). The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

THE PRODUCE PLACE v. THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS. PACA Docket No. 2-7203. Decided November 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$1,485.00 against respondent in connection with a transaction in interstate commerce involving a shipment of tomatoes. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, The Produce Place, is a corporation whose mailing address is P.O. Box 21494, Los Angeles, California 90021. Respondent, The Guy C. Panno Company, Inc., a/t/a Produce Plus, is a cor-

poration whose address is 758 Market Court, Los Angeles, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a default order in this proceeding, the Department was advised that respondent had filed a petition pursuant to the Bankruptcy Code (11 U.S.C. § 1101-*et seq.*), in the United States Bankruptcy Court for the Central District California.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the proceeding now pending in the United States Bankruptcy Court has been closed or dismissed, or that the debts have been discharged.

Copies hereof shall be served upon the parties.

S. STAMOULES, INC. v. AL NAGELBERG & CO., INC. PACA Docket No. 2-7260. Decided November 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$12,230.70 in connection with a transaction involving the shipment of cantaloupes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 9, 1986, complainant notified the Department that it no longer wished to pursue its claim. Complainant, in its letter of September 9, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DIAMOND FRUIT GROWERS, INC. v. INTERNATIONAL A. G., INC. PACA
Docket No. 2-7284. Decided November 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$29,280.00 in connection with a transaction involving the shipment of mixed fruit in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 15, 1986, complainant notified the Department that settlement had been reached and that it no longer wished to pursue its claim. Complainant, in its letter of September 15, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RITCLO PRODUCE, INC. v. MICHIGAN REPACKING AND PRODUCE CO.
PACA Docket No. 2-6774. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER UPON RECONSIDERATION AND DENYING PETITION TO REHEAR AND REARGUE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on July 9, 1986, awarding reparation to complainant against respondent. On July 23, 1986, respondent filed a petition to rehear, reargue and reconsider this matter. On August 18, 1986, the order of July 9, 1986, was stayed and complainant was granted 15 days from receipt thereof to file an answer to respondent's petition. On September 12, 1986, complainant filed an answer.

We have thoroughly considered the matters raised in respondent's petition and find them without merit. Upon reconsideration of our order of July 9, 1986, we find that such order is fully supported by the evidence and the law applicable thereto. Accordingly respondent's petition should be and hereby is dismissed. The stay order of August 18, 1986, is vacated and the order of July 9, 1986, is hereby reinstated, except that the reparation awarded to complain-

ant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

PURE GOLD, INC. v. HARVEY C. HANSEN d/b/a Harvey's. PACA
Docket No. 2-7280. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$1,580.00 in connection with a transaction involving the shipment of lemons in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 26, 1986, complainant notified the Department that complainant no longer wished to pursue its claim. Complainant, in its letter of September 26, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ANTHONY PODESTA, INC. v. FOPPIANO PACKING Co., INC. a/t/a JMB
PACKING Co. PACA Docket No. 2-6916. Decided November 21,
1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION AND DENIAL OF PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 9, 1986, awarding reparation to complainant against respondent. A copy of this order was served upon respondent and on August 1, 1986, respondent moved that this matter be reopened and reconsidered. On August 18, 1986, the order of July 1, 1986, was stayed and complainant was given fifteen days from date of receipt of the stay order to file an answer to the petition to reopen and reconsider. Such answer was filed on September 3, 1986.

This case was decided after careful consideration of the evidence furnished by the parties. The record has been reviewed in the light of the points raised by respondent in its petition and, in our opinion, the order of July 9, 1986, is amply supported by the evidence and the law applicable thereto. Respondent has stated no reasons which would justify reopening this proceeding. Accordingly, respondent's petition to reopen is denied and the petition for reconsideration is dismissed. The stay order of August 18, 1986, is vacated. The order of July 9, 1986, is reinstated, except that the reparation awarded in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

GRASSO FOODS, INC. v. THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided December 1, 1986.

Edward Silverstein, presiding officer.

Complainant, *pro se*.

Richard L. Frank, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on October 3, 1986, awarding reparation to the complainant in the amount of \$13,200.00. This order was corrected by an order issued October 23, 1986. By petition dated November 5, 1986, respondent has moved that this matter be reconsidered and that the record be reopened for the taking of further evidence.

Accordingly, the order of October 3, 1986, as corrected by the order of October 23, 1986, is hereby stayed. Complainant has ten days from its receipt of this order in which to file a response to respondent's petition.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon complainant.

CENTRAL VALLEY PRODUCE, INC. v. KEN GRIMES PRODUCE CO. PACA
Docket No. 2-7278. Decided December 1, 1986.

Andrew Stanton, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Stuart Todd, Seattle, Washington, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,650.00 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of October 29, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PETER SOLOMON & JOSEPH R. SOLOMON d/b/a CATTLE VALLEY
FARMS v. FRANCIS L. OLSON d/b/a COEXPORT WEST and/or
COEXPORT INTERNATIONAL, INC. PACA Docket No. 2-6651. De-
cided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), complainant has advised the Department that its claim against respondent Coexport International, Inc., has been satisfied in accordance with the settlement agreement previously agreed to between complainant and such respondent. Accordingly the complaint against respondent Coexport International and the counterclaim of such respondent against complainant are dismissed.

Copies of this order shall be served upon the parties.

M&C P FARMS v. LLOYD MYERS Co., INC. PACA Docket No. 2-6873.
Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on September 29, 1986, awarding reparation to the complainant in the amounts of \$52,386.96 plus interest from December 1, 1984, until paid, and \$5,716.78 plus interest from the date of the order until paid. On October 24, 1986, the respondent moved for reconsideration of that decision.¹

As its primary ground for reconsideration, respondent argues that complainant failed to prove that respondent received payment from La Maison De Fruits Et. Le Gumes Supra, Inc., ("La Maison") in the amount of \$52,739.70 as alleged by the former and as found by us in the September 29, 1986, Decision and Order. However, we are satisfied that the preponderance of the evidence in the record, which consists of checks made out to respondent by La Maison and La Maison's claim in its answer to complainant's Canadian lawsuit that it paid respondent the \$52,739.70, establishes that respondent did, in fact, receive such payments. Moreover, that we correctly concluded that respondent did receive such payments is made clear by the fact that respondent's president, Lloyd Myers, was present at the hearing where the critical documents were made part of the record and, although present and aware that those documents were being received into evidence, he refused to take the stand to testify that it did not actually receive the payments represented by those checks. Under the circumstances presented here, after those documents were made a part of the record at the hearing, respondent had the burden of going forward to dispute the evidence showing that it did receive the payments from La Maison totalling \$52,739.70. *See Walker & Hagan v. Amato*, 27 Agric. Dec. 1643 (1968); and *A. Levy & J. Zentner Co. v. Wuhl-Shafman-Lieberman*, 28 Agric. Dec. 1571 (1969). Since it failed to do so, we had no choice

¹ Respondent also moved for reopening of the hearing on the ground that it was entitled to cross-examine respondent regarding the complaint which was filed on complainant's behalf in the Canadian courts which complaint, although made a part of the record herein by the presiding officer at the hearing, was not physically received until after the close of the hearing. *See* fn. 1 of the September 29, 1986, Decision and Order. As there is nothing substantive in the Canadian complaint which would have any affect upon our decision in this case, respondent's motion is denied.

transactions involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 22, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 22, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VAL-MEX FRUIT COMPANY, INC. v. LA PREFERIDA OF TEXAS, INC.
PACA Docket No. 2-7266. Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,533.84 in connection with a transaction involving the shipment of jalepenos in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 3, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 3, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SARAS, INC. v. RICHARD DURAN d/b/a CALIFORNIA PICKLE. PACA
Docket No. 2-7072. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$11,626.40 in connection with

a transaction involving the shipments of cucumbers in interstate commerce.

A copy of the formal complaint was served on respondent. By an undated letter, complainant notified the Department that it wished to dismiss its complaint against respondent contingent upon respondent paying to a third party the outstanding balance. By letter dated October 17, 1986, said third party notified the Department that respondent had paid in full the outstanding balance. Said third party, in its letter of October 17, 1986, authorized dismissal of the complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

D'ARRIGO BROS. CO. OF CALIFORNIA v. M. OFFUTT Co., INC. PACA
Docket No. 2-7271. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$15,138.20 in connection with two trucklots of lettuce and broccoli in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 7, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MOUNTAIN VALLEY, INC. v. INTERNATIONAL A. G., INC. PACA
Docket No. 2-7320. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

against respondent in the amount of \$5,895.00 in connection with two trucklots of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 1, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 1, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL,
JUDICIAL OFFICER

YAKIMA FRUIT & COLD STORAGE Co. v. B & B WHOLESALERS, INC. a/
t/a PATT WHOLESALE PRODUCE. PACA Docket No. RD-86-502. De-
cided November 3, 1986.

Respondent was ordered to pay complainant, as reparation,
\$7,406.00, with interest thereon at the rate of 13 percent per
annum from January 1, 1986, until paid.

PERO BROTHERS FARMS, INC. v. DELEGAL CORPORATION. PACA
Docket No. RD-86-503. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation,
\$135,309.50, with interest thereon at the rate of 13 percent per
annum from January 1, 1986, until paid.

MERIT PACKING COMPANY v. TOC PRODUCE DISTRIBUTORS CORPORA-
TION. PACA Docket No. RD-86-504. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation,
\$565.00, with interest thereon at the rate of 13 percent per annum
from September 1, 1985, until paid.

C.A. ABATTI d/b/a ALEX ABATTI BROKERAGE a/t/a A & M PRODUCE
Co. v. NORTHEAST PRODUCE DEALERS, INC. PACA Docket No. RD-
86-505. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation,
\$1,260.00, with interest thereon at the rate of 13 percent per
annum from December 1, 1985, until paid.

BERENDA FRUIT COMPANY v. JOE PINTO & SON, INC. PACA Docket
No. RD-86-506. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,701.56, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

W.B. STEINBRECHER & SONS *v.* SANTA FE PRODUCTS, INC. PACA Docket No. RD-86-507. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,000.00, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

GRIFFIN & BRAND OF McALLEN, INC. *a/t/a* INTERNATIONAL FROZEN FOODS *v.* A-ONE SALES. PACA Docket No. RD-86-508. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$23,570.58, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

11-R SALES CORP. *v.* CHINOOK MARKETING CO., INC. PACA Docket No. RD-86-509. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation \$2,200.00, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

LUDDEN PRODUCE, INC. *v.* TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-510. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,236.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

FAR SOUTH, INC. *a/t/a* QUALITY PRODUCE CO. *v.* HE BO FARMS and/or JACK BOWEN. PACA Docket No. RD-86-422. Decided November 13, 1986.

Respondent was ordered to pay complainant, as reparation, \$41,000.00, with interest thereon at the rate of 13 percent per annum from September 1, 1984, until paid.

VEG-A-MIX *v.* JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-86-497. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,428.24, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

WOODY'S TOMATO CORP. *v.* TERRIFIC TOMATO COMPANY. PACA Docket No. RD-87-2. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,440.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

SILVER CREEK PACKING CO., INC. *v.* JOE PINTO & SON. PACA Docket No. RD-87-3. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,518.24, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* LEGEIS PRODUCE CORP. PACA Docket No. RD-87-4. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,006.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

SEAL PRODUCE, INC. *v.* ROBERT M. GISSER d/b/a ROBERT GISSER PRODUCE BROKERAGE & DISTRIBUTION. PACA Docket No. RD-87-5. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,999.46, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

RED BALL POTATO COMPANY, INC. v. P & M PRODUCE, INC. PACA Docket No. RD-87-6. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,652.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

PER-CLIN ORCHARDS, INC. v. B.G. MARKETING COMPANY. PACA Docket No. RD-87-7. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$10,460.00, with interest thereon at the rate of 18 percent per annum from March 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE v. GARCIA PRODUCE. PACA Docket No. RD-87-8. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$940.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

COOK DISTRIBUTING CO. v. RALPH M. JARSON d/b/a RALPH JARSON and/or JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-87-1. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$14,163.81, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

THOMAS HEIMBUCH d/b/a HEIMBUCH FARMS v. DANA R. JOHNSON d/b/a U.S. FOOD MARKETING. PACA Docket No. RD-87-10. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,100.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

CULIACAN PRODUCE CO., INC. *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-11. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$30,109.86, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

GREINER BROS. *v.* EDUARDO FLORES d/b/a EDUARDO FLORES AND SONS. PACA Docket No. RD-87-12. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$19,249.50, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

MONTEREY MUSHROOMS, INC. *v.* FRESHROOMS OF OHIO, INC. PACA Docket No. RD-87-13. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$87,071.50, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

WILLIAM H. CLAPP d/b/a TOP BILLING *v.* JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-87-14. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,511.50, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

HAROLD TATEYAMA & SON, INC. *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS AND FRUIT EXCHANGE. PACA Docket No. RD-87-15. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,175.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

FANCEE FARMS, INC. v. WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE Co. PACA Docket No. RD-87-16. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,509.00, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

DAVE WALSH Co., INC. v. JOE PINTO & SON, INC. PACA Docket No. RD-87-18. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,987.20, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

ADAMS FARMS v. HOUSTON PRODUCE DISTRIBUTING, INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-87-19. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$17,961.75, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

FRANK S. ECKEL, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION v. VIC MAHNS, INC. PACA Docket No. RD-87-21. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$462.25, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

PURE GOLD, INC. v. ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE a/t/a PRIMA TRADING CO. PACA Docket No. RD-87-22. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$21,697.00, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

SUNLAND PRODUCE CO. v. INTER-TEX ENTERPRISES, INC. PACA Docket No. RD-87-24. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,211.50, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

M. OFFUTT CO., INC. v. GORE & FRANK, INC. PACA Docket No. RD-87-25. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$657.62, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

W.E. BITTINGER COMPANY, INC. v. EDWARD BOKER, INC. PACA Docket No. RD-87-26. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,887.50, with interest thereon at the rate of 13 percent per annum from June 1, 1986, until paid.

BUSHMAN'S INC. v. VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-27. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,323.75, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

ALAMO PACKING CO. v. JOE PINTO & SON, INC. PACA Docket No. RD-87-28. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$29,324.30, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

PEMBERTON PRODUCE, INC. v. JOE PINTO & SON, INC. PACA Docket No. RD-87-29. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,240.00, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

DEW-GRO, INC. a/t/a CENTRAL WEST PRODUCE v. JOE PINTO & SON, INC. PACA Docket No. RD-87-30. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,647.66, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

S. STAMOULES, INC. a/t/a STAMOULES PRODUCE CO. v. JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-87-31. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$12,195.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

GOLD COAST PACKING, INC. v. MELON PRODUCE, INC. PACA Docket No. RD-86-395. Decided November 5, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 10, 1986, awarding reparation to

the complainant in the amount of \$52,082.50. By motion received October 9, 1986, respondent has moved that this matter be re-opened after default.

Accordingly, the order of September 10, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this Order.

S & S PRODUCE v. VAN DE WALLE FARMS, INC. PACA Docket No. RD-86-480. Decided November 5, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent will have 10 days from the receipt of this order to file an answer, in triplicate.

Copies of this order shall be served upon the parties.

THOMAS KALLICHES, INC. v. JOSEPH GALIOTO & SONS, INC. PACA Docket No. RD-86-372. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$320,398.38 in connection with

a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 15, 1986, complainant notified the Department that it requested dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TROPICAL PRODUCE COMPANY *v.* SAMONA BENEVIDEZ and VISTA McALLEN, INC. d/b/a WORLDWIDE IMP-EX. PACA Docket No. RD-86-432. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

QUAKER CITY PRODUCE COMPANY *v.* CHEMUNG FOOD, INC. PACA Docket No. RD-86-481. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

against respondent in the amount of \$1,174.00 in connection with a transaction involving the shipment of a perishable agricultural commodity in interstate commerce.

A copy of the formal complaint was served on respondent. Respondent did not file an answer to the complaint and was considered to be in default. However, before a default was issued in this proceeding, by letter dated September 17, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of September 17, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

HORACE T. HOLMES & SONS v. IMPERIAL BRANDS, INC. PACA Docket
No. RD-86-364. Decided December 1, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$280,000.00 in connection with a transaction involving the shipment of peaches in interstate commerce.

A copy of the formal complaint was served on respondent which failed to file an answer thereto. However, before a decision could be issued, the Department was notified that respondent had filed a petition in bankruptcy. Accordingly, on August 14, 1986, this matter was stayed pending completion of respondent's bankruptcy. In a letter received by the Department on October 30, 1986, complainant requested dismissal of its complaint.

Accordingly, the complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING CO. v. VIC MAHNS, INC. PACA Docket No.
RD-87-17. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendleson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

LUZ G. PIESZKO
Volume 45 Number 6

In re: LUZ G. PIESZKO. PQ Docket No. 82. Decided November 12, 1986.

Civil Penalty.

The Judicial Officer affirmed the default decision issued by Judge Palmer assessing a civil penalty of \$250 because respondent violated the regulations governing the importing of meat products into the United States by importing cooked meat pies with pork from the Philippines, that were not accompanied by a certificate containing prescribed information. Respondent failed to file a timely answer, and, therefore, a default decision was properly issued. Although the ALJ did not refer to respondent's objections filed with respect to complainant's proposed decision and order, there is no requirement in the regulations that the ALJ answer such objections. Mitigating circumstances raised for the first time in respondent's appeal come too late to be considered, but, in any event, they would not reduce the sanction here. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

Jaru Ruley, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, 122), for a violation of the regulations governing the importing of meat products into the United States from foreign countries and localities (9 CFR § 94.1 *et seq.*). An initial Decision and Order was issued on July 1, 1986, by Administrative Law Judge Victor W. Palmer (ALJ) assessing a civil penalty of \$250.

On August 12, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.85).¹ The case was referred to the Judicial Officer for decision on September 22, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of meat products from foreign countries and localities (9 CFR § 94.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR § 1.130 *et seq.* and 9 CFR § 93.10 *et seq.*

This proceeding was instituted by a Complaint filed on April 4, 1985, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 13, 1984, the respondent imported cooked meat pies with pork into the United States in violation of sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)), because the cooked meat pies with pork were not accompanied by a certificate containing prescribed information.

On April 9, 1985, the complaint was sent to Ms. Pieszko by certified mail. The complaint was returned to the Hearing Clerk's office on or about April 30, 1985, marked unclaimed. Pursuant to section 1.147(b) of the Rules of Practice (7 CFR § 1.147(b)), the complaint was then posted by regular mail by the Hearing Clerk's office. The respondent has not filed an Answer to the Complaint. This failure to file an Answer is deemed, for purposes of this proceeding, to be an admission of the allegations contained in the Complaint and, consequently, a waiver of hearing. (See 7 CFR §§ 1.136(c) and 1.139).

Accordingly, the material facts alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Luz G. Pieszko, is an individual whose address is 95 Summit Avenue, Jersey City, New Jersey 07304.

2. On or about December 13, 1984, the respondent imported cooked meat pies with pork into the United States at Seattle, Washington, from the Philippines, in violation of sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)), because the cooked meat pies with pork were not accompanied by a certificate containing prescribed information.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer² or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless

² Respondent filed an untitled document, referred to by respondent as an "objection," which was dated "May 11, 1985." If this date were accurate, respondent would have technically met the deadline for filing an answer as required by 7 CFR § 1.136(a). However, it is clear from the record that that date was an oversight by respondent. It was probably sent May 11, 1986, because it was received by the Hearing Clerk on May 19, 1986, and purported to state objections to Complainant's Proposed Decision and Order of April 23, 1986. Moreover, respondent's August 4, 1986, letter requesting review by the Judicial Officer refers specifically to the letter in question as being "forwarded [by respondent] on May 11, 1986. . . ." In any event, even if it were to be construed as a timely "answer," it still would not change the result as it does not deny the allegations in the complaint, as required.

the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 Procedure for Hearing.

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a \$250 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to file a timely answer or deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 1-2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not the respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The

respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant di-

not object,³ respondent has shown no basis for setting aside the default decision here.⁴

³ *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁴ See *In re Henson*, 45 Agric. Dec. ____ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1986); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhou*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' con-

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" ⁵ If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The Department's rules govern respondent's contention in his August 4, 1986, letter, that his late-filed May 11, 1986, "objections" letter constituted an "answer." The analysis, *supra*, demonstrates that it is not an "answer" within the rules.

There remains the procedural point raised by respondent that the ALJ did not acknowledge his May 11, 1986, letter in the July 1, 1986, Decision and Order. Although the record shows that the Hearing Clerk telephoned respondent to assure respondent that the ALJ had considered the May 11, 1986, letter, no such acknowledgment, verbal or written, is required by the rules. "If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing" (7 CFR § 1.139).

The remainder of the August 4, 1986, appeal to the Judicial Officer raises four objections: that respondent could not pay the original fine because she had no money; that respondent speaks imperfect English and did not understand the charges; that the pork pie actually had had the pork removed; and that the violation was not intentional. These are alleged mitigating circumstances, which are not appropriate to present at this level of review in a default proceeding. See *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986). However, even if it were appropriate to consider them,

tentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁵ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 148 (1940); accord *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

they would not alter the outcome here, because this case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

There are some differences between the facts here and the facts in *Lopez*; however, the differences are not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed, loopholes would be created that could prove disastrous to American agriculture.

For the foregoing reasons, the following order should be issued.

ORDER

The respondent, Luz G. Pieszko, is hereby assessed a civil penalty of \$250 which shall be paid within 30 days after service of this order. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, U.S. Department of Agriculture, Room 2422, South Building, Washington, D.C. 20250-1400.

APPENDIX

In re Lopez, 44 Agric. Dec. ____ (Oct. 7, 1985).

[Omitted.—Ed.]

In re: KATHY FAUSNAUGHT. P.Q. Docket No. 149. Decided October 8, 1986.

Importation of mangoes without a limited permit or certificate—Civil penalty—Default.

Joseph P. Pembroke, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) and the Federal Plant Pest Act (7 U.S.C.

150aa *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 150 and 159 of the Act (7 U.S.C. § 150 and § 159) and section 318.13-4 of the regulations promulgated thereunder (7 CFR §§ 318.13-4)

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on June 4, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the amended complaint. Respondent has not filed an answer to the amended complaint. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice to this proceeding (7 CFR §§ 1.136 and 1.139).

FINDINGS OF FACT

1. Kathy Fausnaught, is an individual whose mailing address is 2704 13th Avenue, Oakland, California 94606.

2. On or about June 19, 1985, Kathy Fausnaught imported (15) fifteen mangoes from Hawaii to Oakland California, in violation of section 318.13-4 of the regulations (7 CFR 318.13-4), because the mangoes were not imported under a limited permit or certificate, as required.

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

CONCLUSION

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated there under. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed a civil penalty of two hundred and fifty dollars which shall be payable to the "Treasurer of the United States", by certified check or money order, and shall be forwarded

to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final November 20, 1986.—Ed.]

In re: AMERICAN AIRLINES, INC. PQ Docket No. 234. Decided December 1, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$450.

Kevin Thiemann, for complainant.

Andrew Cuomo, Ft. Worth, Texas, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that American Airlines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 319.74 *et seq.* and 330.100 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material

issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. American Airlines, Inc., respondent, is a corporation doing business at P.O. Box 619616, Dallas/Fort Worth Airport, Texas 75261-9616.

2. On or about December 10, 1985, the respondent released a shipment of cut flowers that had been imported into the United States from Mexico at the Dallas/Fort Worth Airport, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars (\$450.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 234.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: AMERICAN AIRLINES, INC. PQ Docket No. 232. Decided December 3, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of \$1,875.

number of bags to the continental United States on respondent's flights numbers 2 and 8.

3. On or about January 8, 1986, at Kahului Airport, Kahului, Maui, Hawaii, respondent checked a bag to the continental United States on respondent's flight number 64.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent shall pay one thousand eight hundred seventy-five dollars (\$1,875.00) in full settlement of all outstanding claims in the above-referenced proceeding. The respondent shall send a certified check or money order for \$1,875.00, payable to the "Treasurer of the United States," to the U.S. Department of Agriculture, APHIS, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55408, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: MARIE FERRIER. P.Q. Docket No. 177. Decided August 8, 1986

Importation of mangoes without the required permit—Civil penalty—Default.

Jaru Ruley, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice and Procedure (7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*)

This proceeding was instituted by a Complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about June 22, 1985, the respondent

imported mangoes into the United States at Jamaica, New York, from Haiti, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the mangoes were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

On February 20, 1986, the respondent signed a return receipt indicating that she had received the Complaint. Although the respondent's Answer was required to be filed in the Office of the Hearing Clerk by March 12, 1986, as of March 31, 1986, no such Answer has been filed. This failure to file an Answer is deemed, for purposes of this proceeding, to be an admission of the allegations contained in the Complaint and, consequently, a waiver of hearing. (See 7 CFR §§ 1.136(c) and 1.139).

Accordingly, the material facts alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACTS

1. Respondent, Marie Ferrier, is an individual whose address is 26 Seabring Street, Spring Valley, New York 10977.

2. On or about June 22, 1985, the respondent imported mangoes into the United States at Jamaica, New York, from Haiti, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondent, Marie Ferrier, is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to

the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 CFR § 1.145).

[This decision and order became final December 12, 1986.—Ed.]

In re: MOR BODANSKY. P.Q. Docket No. 230. Decided October 23, 1986.

Importation of an apple without the required permit—Civil penalty—Default.

Clement J. McGovern, for complainant.

Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (7 U.S.C. § 151 *et seq.*) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 151 of the Act (7 U.S.C § 151) and section 319.56-2(e) of the regulations promulgated there under (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on April 23, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, the respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and constitute a waiver of hearing. More than twenty (20) days have elapsed since the respondent was served with the complaint in question. The respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Mor Bodansky is an individual whose address is 172 Heyward Street, Brooklyn, New York 11206.

2. On or about December 9, 1985, at John F. Kennedy International Airport, the respondent imported one apple from Israel into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit.

CONCLUSION

By reason of the facts in the findings of fact set forth above, the respondent violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

The respondent is hereby assessed a civil penalty of two hundred fifty dollars.¹ The civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 12, 1986.—Ed.]

In re: ROBERTO CABILI. PQ Docket No. 280. Decided December 23, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$250.

¹ This civil penalty is in conformance with the guides for civil penalties set forth in *In re Lopez*, 44 A.D. ____ (October 7, 1985); see also *In re Andrea Leo*, 45 A.D. ____ (January 27, 1986). Counsel for complainant had requested a civil penalty in the amount of \$750.00.

Clement McGovern, for complainant
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Acts and regulations promulgated thereunder (9 CFR § 93.1 *et seq.*, 7 CFR § 380.1 *et seq.*, and 7 CFR § 1.130 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Robert Cabili, herein referred to as the respondent, is an individual whose address is Roberto Cabili, c/o Aerolineas Airlines, Miami International Airport, P.O. Box 59-2477—AMF, Miami, Florida 33159-2477.

2. On or about May 16, 1986, the respondent was in possession of certain foreign origin garbage that was removed from Argintineas Airlines flight AR-332, that arrived from Brazil at Miami International Airport.

CONCLUSION

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

This Decision and Order shall become effective on the day upon which service of this order is made upon respondent.

In re: DELTA AIRLINES. PQ Docket No. 279. Decided December 24, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of \$750.

Clement McGovern, for complainant.

Jason R. Archambeau, Atlanta, Georgia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Delta Airlines, herein referred to as the respondent, is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii, with a mailing address of Delta Airlines, Office of the General Counsel, Honolulu International Airport, Honolulu, Hawaii 96819.

2. On or about May 28, 1986, the respondent was in possession of three pieces of luggage, with bag tag numbers 38-59-04, 38-59-06, 38-59-07, which were destined for Mobile, Alabama via Delta flight 24 and flight 1009, at Honolulu International Airport, Honolulu, Hawaii.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of seven hundred fifty dollars (\$750.00) which shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403. The payment shall be due within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KAREN HOM. P.Q. Docket No. 48. Decided November 13, 1986.

Failure to present luggage for inspection at an airport—Civil penalty.

Respondent failed to present luggage which was in her possession at Honolulu International Airport, for inspection as required by regulations. Respondent was assessed a civil penalty of \$150.

Jaru Ruley, for complainant.

Kendall Wong, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding pursuant to the Plant Quarantine Act, as amended (7 U.S.C. § 151 *et seq.*), and the regulations promulgated thereunder. The complaint, filed on January 28, 1985, alleged that the respondent failed to present luggage for inspection by APHIS officials as required by controlling regulation (7 CFR § 318.13-12). An answer was filed by Ms. Hom on February 27, 1985, in which she advised that she would be represented by Mr. Kendall Wong, Esq., Honolulu, Hawaii. Complainant thereafter moved that this matter be set down for hearing in Honolulu, Hawaii, together with other cases pursuant to the Plant Quarantine Act.

I conducted an oral hearing in this matter on November 3, 1986, at which complainant was represented by Jaru Ruley, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented by Kendall Wong, Esq., 1023 Kawaihao Street, Honolulu, Hawaii 96814.

Upon consideration of the evidence of record and the arguments by the parties, an Order is being entered this day assessing respondent a civil penalty of \$150.00 for her failure to comply with the Act and the regulations thereunder.

FINDINGS

1. Karen Hom, herein referred to as the respondent, is an individual whose address is 4026 Pakahi Place, Honolulu, Hawaii 96816.

2. On or about October 4, 1984, the respondent violated sections 318.13-12(a) and 318.13-10 of the regulations (7 CFR §§ 318.13-12(a) and 318.13-10)) in that respondent failed to present three pieces of baggage which were in her possession at Honolulu International Airport and which were subject to inspection, for said inspection.

CONCLUSION

By reason of the facts set forth in Finding No. 2, *supra*, the respondent has violated the Act and the regulations pursuant thereunder. Accordingly, the following order is being entered.

ORDER

The respondent is hereby assessed a civil penalty of one hundred fifty dollars (\$150.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order in that amount, to Jaru Ruley, Esq., Office of the General Counsel, Room 2416A South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

The Order shall become effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final December 26, 1986.—Ed.]

In re: CULVER DUCK CORPORATION. PPIA Docket No. 16. Decided December 2, 1986.

Product Labeling.

Respondent consented to the issuance of this decision and order in which they were ordered to modify their labels as indicated in the exhibits.

Andrea Bateman, for complainant.

J.A. Whitmer, Elkhart, Indiana, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Poultry Products Inspection Act, as amended (21 U.S.C. § 451 *et seq.*), hereinafter referred to as the PPIA, and the Applicable Rules of Practice (9 CFR § 381.233 *et seq.*) to withdraw a label or modify a label with the phrase "5 Generations of Long Island Breeding and Growing Experience" on the basis that the label was misleading. This proceeding was commenced by a notification of the Administrator's determination, answer and request for a hearing, by respondent, which constituted the complaint. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision as set forth below and, have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

a. Any further procedural steps;

b. Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof; and

c. All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. This stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. Culver Corporation is an official poultry processing establishment, which processes poultry products including the product in

this subject case, which are subject to label approval under section 8 of the Poultry Products Inspection Act (21 U.S.C. § 457).

2. Approval of the poultry product label of Culver Corporation with the phrase "5 Generations of Long Island Breeding and Growing Experience" was withdrawn and denied.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. The label, a copy of which is attached as Exhibit A, will be modified as follows:

a. The phrase "5 Generations of Long Island Breeding and Growing Experience" will be removed. The phrase "Five Generations of Breeding and Growing Experience" will be placed at the top of the label.

b. The island will be removed from the pictorial.

c. The phrase "One of the original developers of the duck breeding and growing practices used on Long Island" will be placed below the pictorial.

A copy of the label with the modifications indicated in draft is attached as Exhibit B.

2. The Department, through the Administrator, will agree to allow the exact language set forth above and on Exhibit B or similar language by the respondent.

3. If in the future respondent wants to use a label with any address other than the Long Island address, respondent may use the phrase "5 Generations of Long Island Breeding and Growing Experience."

4. The above agreement will be applicable to future labels submitted for approval by any member of the Herbert R. Culver family or related business entities.

5. This order shall become effective on the day upon which service of this Order is made upon the respondent.

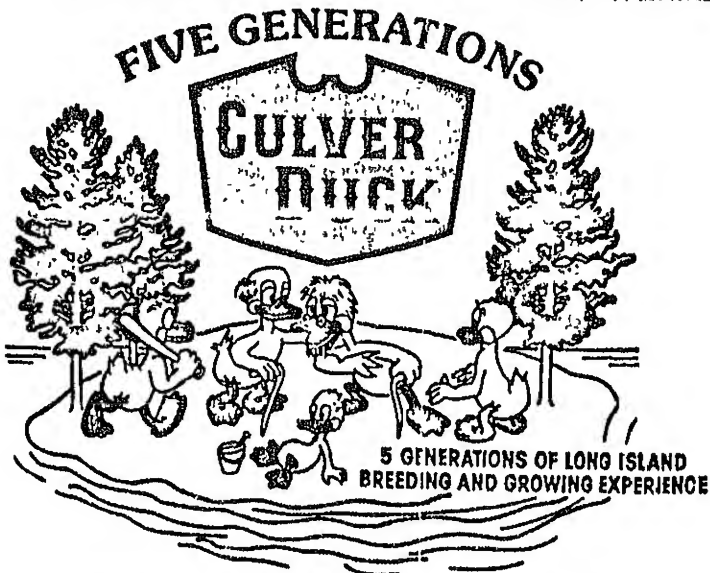
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DUCKLING ON A GRILL

Quarter or cut up a duckling and immerse with giblets in salted boiling water for 45 minutes or until just barely done. Do not overcook. Remove from water, (this may be used with giblets for soup stock), and immediately (while hot) put in container with a marinade sauce. Marinate 1-24 hours. Duckling may be frozen in marinade sauce for

Exhibit A



young duckling



NET WEIGHT

KEEP REFRIGERATED



DISTRIBUTED BY CULVER CORPORATION, WESTHAMPTON BEACH, LONG ISLAND, N.Y. 11978
PRODUCT OF U.S.A.

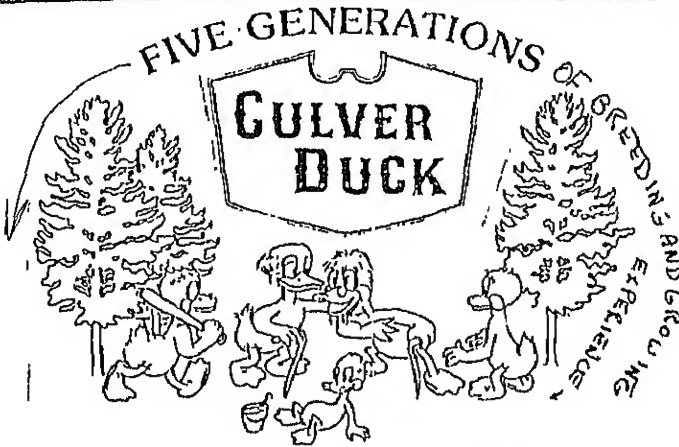
GRILLED DUCKLING

Thaw duckling in hot water, then quarter with sharp knife or poultry scissors. Place duckling in large kettle of water seasoned with ginger, curry and salt. Simmer duckling in boiling water until just barely tender. Remove all fat by rinsing under running water. Marinate several hours or overnight in 12 oz undiluted orange concentrate and 1 lbs of ginger, white refrigerated. Place duckling on grill over medium low heat for 15 minutes, each side, basting frequently with remaining marinade.

PREPARATION OF COVERED BARBECUE EQUIPMENT

Arrange approximately 80 charcoal briquets in a circular pile. Ignite thoroughly. Use an aluminum pan 12" x 18" x 2" deep and place in cooker. Surround aluminum pan with briquets. Place the duckling breast side up on top of the grill and directly above the aluminum pan so the drippings will fall into the pan. Cover and cook with all drains open for 2 hours, basting with heated marmalade after each hour. Allow duckling to crisp for 30 minutes. Makes enough for 2 to 4 servings.

Exhibit B



One of the original developers of the duck breeding and growing practices used on Long Island

young duckling



NET WEIGHT

LBS OZS

KEEP FROZEN



DISTRIBUTED BY CULVER CORPORATION, WEST HAMPTON BEACH, LONG ISLAND, N.Y. 11761

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